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S. HRG. 107–939

CLASS ACTION LITIGATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

JULY 31, 2002

Serial No. J–107–98

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

87–640 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CLASS ACTION LITIGATION

WEDNESDAY, JULY 31, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:23 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Hatch, Sessions, and McConnell.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. If we might come to order. I see all of you here. I appreciate the fact that we had to move this time somewhat to accommodate the funeral, as you mentioned earlier, and I applaud Senator Kohl in requesting this hearing and Senator DeWine, of course, as ranking member. I hope this hearing will present a fair and balanced view of class action litigation in our State and Federal courts.

It is my attention to undertake a deliberate and careful review of information from parties actually involved in class action litigation to provide a realistic picture of the benefits and problems with class action litigation.

Unfortunately, I believe that some special interest groups have distorted the state of class action litigation by relying on a few anecdotes in their ends-oriented attempt to justify moving almost all class action cases involving state law into Federal court; in other words intending to really trample over any kinds of States' rights in these areas.

I hope this hearing will focus fairly on the hard evidence and facts in most class action cases. We should remember that our State-based tort system remains one of the greatest and most powerful vehicles for justice anywhere in the world. One reason for that is the availability of class action litigation to let ordinary people band together to take on powerful corporations and, in some instances, even their own Government.

I remember after the breakup of the Soviet Union a group of legal experts from now the new country of Russia came to visit with me and other Senators, and they said, "We have to ask you a question. We understand that there are instances where people sue your Government, and the Government loses. Is that possible?"

I said, "Yes, it happens quite often."

They said, "Well, do they not just then fire the judges or do it over again?"

I said, "No, we have an open and clear form of litigation," and that was the most amazing thing to them, that an ordinary person could go in, bring suit against their Government, and if they had the law and the facts on their side, they won.

We have defrauded investors—matters of some interest lately—deceived consumers, victims of defective products, asbestos survivors, smokers, and thousands of other ordinary people have all been able to rely on class action lawsuits under our State-based tort system to seek and receive justice.

I am old enough to remember the civil rights battles of the 1950's and 1960's and the impact of class actions to vindicate basic rights through our courts.

The landmark Supreme Court decision *Brown* v. *Board of Education* was a culmination of appeals from four class action cases; three from Federal court decisions in Kansas, South Carolina and Virginia, and one from a decision by the Supreme Court of Delaware. Only the Supreme Court of Delaware, the State court, unlike the Federal courts, only the State court got the case right by deciding for the African-American plaintiffs. The Supreme Court of Delaware, a State court, understood before any Federal court, that separate, but equal is inherently unequal.

More recently, the tobacco class action litigation has contributed to fundamentally change the very dynamics of tobacco and public health. For the first time, that class action litigation uncovered and presented serious and credible evidence about the tobacco industry's 45-year campaign of deception about the dangers of cigarettes. As a result of class action settlements negotiated by the State attorneys general and the private bar, it brought about profound changes in the tobacco industry.

The tobacco industry is now finally admitting on its Internet websites that smoking causes cancer and is addictive. Before the litigation, the executives of these same companies denied under oath, before Congress, that smoking was addictive. The suits made them change their mind.

The very existence of the multi-state tobacco settlements is a credit to class action under our State-based civil justice system.

In fact, without the use of class action, does anybody believe the tobacco companies would have ever come to a negotiating table? Without that, the States would not have settlement payments for the next 25 years. Thousands, if not millions, of lives will be saved because of future public health improvements made in the tobacco litigation.

Another example of class action litigation serving the public interest is the Firestone Tire debacle. The national tire recall was started, in part, from the disclosure of internal corporate documents on consumer complaints of tire defects and design errors that were discovered in litigation against Bridgestone/Firestone, Inc.

Plaintiffs' attorneys turned this information over to the National Highway Traffic Safety Administration, triggering an investigation. As a result, Bridgestone/Firestone recalled 6.5 million tires after they were linked to 101 fatalities, 400 injuries, 2,226 consumer

complaints. Later, the NHTSA warned that another 1.4 million tires may be defective.

As reported by TIME Magazine at the time, it is doubtful that the internal corporate consumer complaint information would ever have been seen except for the civil process.

Plaintiffs' lawyers in this type of setting tend to work without pay. Defense lawyers, in this case corporation lawyers, are paid by the hour, and the corporations have an absolute right to have the best defense they can afford, and they do. The plaintiffs' lawyers tend to work without pay for the possibility of obtaining a portion of the proceeds if successful.

In the class actions, if you think that, if you case-by-case, you may only have a small amount of it, and so people think you will not bring a case because you can just cheat each person a little, but if you cheat thousands of people just a little, it is still cheating. That is what happened in the tobacco cases—stockholders and small investors.

I worry about restricting the legal rights of people and leaving them no way to bring about their claims. I am hesitant to restrict legal rights and remedies in an area of corporate irresponsibility and executive misconduct. I was down at the White House signing yesterday, the Sarbanes-Oxley Act, and I heard bipartisan demands for holding corporate wrongdoers accountable for their actions. I am not too eager to give them a new shield, especially when hardworking Americans are being left with over $7 trillion in stock market losses.

Just a few months ago, a group of investors recovered millions in lost investments under State corporate fraud laws in a State class action case. In *Baptist Foundation of Arizona* v. *Arthur Andersen*, these are elderly investors. They banded together to successfully recoup $217 million from Arthur Andersen for questionable accounting practices surrounding an investment trust. This is just one example of how State-based class action litigation can hold corporate wrongdoers answerable.

I look forward to hearing from our witnesses. I may have some disagreements with Senator Kohl about the solutions in this area, but I do that respectfully because he is one of the hardest-working members of this committee, and he a need his counterpart on the Republican side have approached these issues very judicially and very carefully and in a way that should be looked at by the rest of the Senate. That is why I accommodated him with this hearing.

What I thought I would do now is turn to my friend, the ranking member of this committee. One thing I should note, Senator Hatch and others, I would hope that we can find some way—we have been working quietly with your staff, mine, and others—find a way to fairly compensate those suffering and developing afflictions from asbestos. These cases, nobody seems to know where they are going. The Supreme Court issued a challenge to help with asbestos litigation, and I am committed to work with Senators on both sides of the aisle to see if we can find a way out of this specific area of asbestos litigation with legislation and do it in such a way that it does not become a Christmas tree for everybody's pet theory from either the right to the left.

Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I am happy to hear you say that because there are many people who are not suffering who are getting awards in the asbestos litigation, and there are going to be thousands, if not millions, of people who are suffering who might not get compensated, and we have got to solve that problem, and it all comes down to class action reform.

I also share your high opinion of Senators Kohl and Sessions for the work that they are doing on this committee, and the hard work that they have put in. I would like to thank you and Senator Kohl for scheduling this hearing on this important topic of class action litigation, and I am also pleased that the chairman has agreed to hold a hearing in September on the problems with asbestos litigation. I am hopeful that we can work together on these issues.

Over the past decade, it has become clear that abuses of the class action system have reached epidemic levels. In recent years, it has become equally clear that the ultimate victims of this epidemic are poorly represented class members and individual consumers throughout the Nation. The Class Action Fairness Act of 2002 represents a modest, measured effort to remedy the plague of abuses, inconsistencies and inefficiencies that infest our current system of class action litigation.

Now it is essential that we address the abuses that are running rampant in our current class action litigation system. Frequently, plaintiff class members are not adequately informed of their rights or of the terms and practical implications of a proposed settlement. Too often judges approve settlements that primarily benefit the class counsel, rather than the class members. There are numerous examples of settlements where class members received little or nothing, while attorneys received millions of dollars in fees.

Multiple class action suits asserting the same claims on behalf of the same plaintiffs are routinely found in different State courts causing judicial inefficiencies and encouraging collusive settlement behavior. State courts are more frequently certifying national classes leading to rulings that infringe upon or conflict with the established laws and policies of other States.

Despite the mountains of evidence demonstrating the drastically increasing harms caused by class action abuses, I am sure that several here today and in the Senate will attempt to deny the existence of any problem at all. Others will try to confuse the issue with spurious claims that proposed reforms would somehow disadvantage victims with legitimate claims or further worsen class action abuses. Others may even contend that past legislative reforms have contributed to recent financial debacles and that the proposed reforms will encourage more. Such claims are nothing more than red herrings intended to divert today's debate from the real issue.

Now, in this regard, let me emphasize a few points regarding S. 1712. First, this bill does not seek to eliminate State court class action litigation. Class action suits brought in State courts have proven, in many contexts, to be an effective and desirable tool for protecting civil and consumer rights. Nor do the reforms that we will discuss today in any way diminish the rights or practical abilities of victims to be heard or to band together to pursue their claims

against large corporations. In fact, we have included several consumer protection provisions in our legislation that I feel strongly will substantially improve plaintiffs' chances of receiving a fair result in any settlement proposal.

There are three key components to S. 1712. First, the bill implements consumer protections against abusive settlements by: One, requiring simplified notices that explain to class members the terms of proposed class action settlements and their rights with respect to the proposed settlement in "plain English"; No. 2, enhancing judicial scrutiny of coupon settlements; three, providing a standard for judicial approval of settlements that would result in a net monetary loss to plaintiffs; four, prohibiting "bounties" to class representatives; and, five, prohibiting settlements that favor class members based upon geographic proximity to the courthouse.

Second, the bill requires that notice of class action settlements be sent to appropriate State and Federal authorities to provide them with sufficient information to determine whether the settlement is in the best interests of the citizens they represent.

Finally, the bill amends the diversity of citizenship jurisdiction statute to allow large class actions to be adjudicated in Federal court by granting jurisdiction in class actions where there is "minimal diversity" and the aggregate amount in controversy among all class members exceeds $2 million.

Although some critics have argued that this amendment to diversity jurisdiction somehow violates the principles of federalism is inconsistent with the Constitution, I fully agree with Mr. Dellinger, our former Solicitor General, who will testify today that it is "difficult to understand any objection to the goal of bringing to the Federal court cases of genuine national importance that fall clearly within the jurisdiction conferred on those courts by Article III of the Constitution."

Last, I would like to express my appreciation to the many individuals who have shared with me the details of their experiences with class action litigation. In particular, I am grateful to those victims of various abuses of the current system who have come forward and told us their stories in the hope that something possible might come out of their terrible experiences. In particular, I would like to acknowledge Irene Taylor of Tyler, Texas, who is here today. Ms. Taylor was bilked out of approximately $20,000 in a telemarketing scam that defrauded senior citizens out of more than $200 million. In a class action brought in Madison County, Illinois, the attorneys purportedly representing Mrs. Taylor negotiated a proposed settlement which will exclude her from any recovery whatsoever.

I would also like to recognize Martha Preston of Baraboo, Wisconsin. Ms. Preston cannot be here for health reasons, but has sent us a letter that I will submit for the record. Ms. Preston was involved in the famous Bank of Boston case brought in Alabama State courts, which involved the bank's failure to post interest to mortgage escrow accounts in a prompt manner. Although Ms. Preston did receive a settlement of about $4, approximately $95 was deducted from her account to help pay the class action's legal fees of $8.5 million. Notably, Ms. Preston testified before this committee 5 years ago, asking us to stop these abusive class action lawsuits,

but it appears that, at least thus far, that her plea has not been heard.

I would like to ask unanimous consent that written statements from Martha Preston, the Chamber of Commerce, America's Community Bankers, Irving Cohen, Patrick Baird and the American Council of Life Insurers be inserted in the record for today's hearing, Mr. Chairman.

Chairman LEAHY. Without objection.

Senator HATCH. I look forward to hearing from the witnesses today. I am due on the floor right now. Hopefully, I can come back, but I am certainly going to be very interested in this hearing and what is said here today.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. As this hearing was at the request of Senator Kohl, I will hear from him, and then we will start with the witnesses, if that is all right.

Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. I thank you, Mr. Chairman, for calling today's hearing on class action abuse. We have a simple story to tell. Consumers are frequently getting the short end of the stick in class action cases, often recovering coupons or pocket change while their lawyers reap millions.

Our remedies are simple and straightforward. First, class action notices should be written in plain English so consumers understand their rights and their responsibilities. Second, State attorneys general should be notified of proposed class action settlements in order to stop abusive cases if they want. Third, a class action consumer bill of rights will help limit unfair settlements.

Finally, we would allow some class action lawsuits to be removed to Federal court. This is only common sense. These are national cases affecting consumers in 50 States. If the court rules were being drafted today, these are exactly the types of cases which we would want and expect to be tried in Federal court.

Stories of nightmare class action settlements that affect consumers around the country are all too frequent. For example, the suit against Blockbuster Video yielded dollars off coupons for future video rentals for the plaintiffs, while their attorneys collected over $9 million. In California State court, a class of 40 million consumers received $13 in rebates on their next purchase of a computer or monitor; in other words, they had to purchase hundreds of dollars more of the defendants' product to redeem the coupons. In essence, the plaintiffs in this case received nothing, while their attorneys took almost $6 million in legal fees. We could list many, many more examples.

I believe that no one can argue that the class action process is not in serious need of reform. We do not claim that this bill is perfect. We are happy to entertain other proposals in an effort to address a class action problem, but we do feel that we are on the right track. The consumer protections in our bill go a long way to stopping cases like the one involving Martha Preston of Baraboo, Wisconsin, who was a member of the Bank of Boston case. When

her class action suit was over, Mrs. Preston had technically won the case, but ended up owing $75 to her lawyers and defending a lawsuit that her own lawyers filed against her in State court. Under our bill, that would never happen again.

I thank you, Mr. Chairman.

Chairman LEAHY. Thank you. If the witnesses could join us up here, please. First, will be Mr. Paul Bland, who worked for this committee as chief nominations counsel just a few years ago. He is now a staff attorney for Trial Lawyers for Public Justice in Washington, and he was named San Francisco Trial Lawyer of the Year for his work in *Ting* v. *AT&T*. The Court, certifying the class action, declared AT&T's arbitration clause unconscionable and unenforceable for 7 million California residents because it limited consumer damages and banned class actions. He was also named Maryland Trial Lawyer of the Year, and he knows this place well, as does the next witness, Walter Dellinger, who served as Solicitor General for the 1996–1997 term of the Supreme Court.

He is a partner with O'Melveny and Myers. He has argued nine cases before the Supreme Court, including physician-assisted suicide, Brady Act, Religious Freedom Restoration Act, line item veto. All of us know Professor Dellinger, and he has been extraordinarily helpful to this committee over the years.

Thomas Henderson is of the Lawyers' Committee for Civil Rights Under Law. He has 20 years of experience at handling complex civil litigation, largely in the areas of class action, individual civil rights cases, school desegregation, employment discrimination and so forth.

Lawrence Mirel is the Commissioner of the District of Columbia Department of Insurance and Securities Regulation, which has the responsibility of regulating securities brokers in the business of insurance in the District of Columbia. For the past 15 years, he has been in private practice dealing at length with insurance issues from taxation to health care, and we welcome you here.

Mrs. Shaneen Wahl—and it is Wahl? Did I pronounce that correctly?

Ms. WAHL. You did fine.

Chairman LEAHY. Thank you.—Port Charlotte, Florida. She is a class action plaintiff in litigation against an out-of-State insurance company that tripled her health insurance rates after she was diagnosed with breast cancer.

Of course, Mrs. Hilda Bankston of Jefferson County, Mississippi. They own Bankston Drugstore, which has been named a defendant in lawsuits filed by individual plaintiffs against makers of Fen-Phen diet drug. We are glad to have you here, of course.

So why do we not start, Mr. Bland, with you, please.

STATEMENT OF F. PAUL BLAND, JR., STAFF ATTORNEY, TRIAL LAWYERS FOR PUBLIC JUSTICE, WASHINGTON, D.C.

Mr. BLAND. Thanks very much, Mr. Chairman, and thank you very much for giving me the opportunity to appear.

In the dozen years since I left my employment with the committee and Senator Biden, I have been able to see class action litigation from two different sides. I have represented plaintiffs in a number of consumer and toxic tort class actions, and I have also

represented objectors to more than a dozen phony class action settlements. I have had a chance to see both the best and the worst of class action practice, I think.

When I have represented plaintiffs, I have been involved in cases where we have recovered millions of dollars, in some cases tens of millions of dollars, for people who were cheated by large companies, people who were seriously harmed, people who had their houses destroyed by pollution, people who lost their savings.

To read the papers recently, you would think that Enron, and WorldCom, and some of the recent scandals have sort of invented or revealed a new problem not previously known in the country of corporate wrongdoing, but for people who have represented consumers on the front lines, and particularly low-income people, we were not surprised at all.

I have seen some cases where large and powerful companies have really engaged in outrageous frauds, where they have simply targeted a group of people, and they particularly are likely to target low-income people for rip-offs, where they will hit everybody the same way, but the cases tend to involve so little money, that it would be impossible to challenge the cases on an individual basis, and also the frauds are usually set up in a way that it is not that easy to figure out. So the vast majority of consumers would never know what had happened. They would never be able to figure it out unless you had someone who was able to put in the time and the effort to do that.

Now the reality is that in those cases class actions are often the only way that those people are going to recover anything, the only way that they are going to be protected. I just did a case where we had a trial, where one of the issues in the trial was actually whether class actions are needed in order to protect people's rights. AT&T, effective last August, adopted a new standard form contract that requires all AT&T customers with claims of a certain size to go to arbitration. Generally, arbitration clauses are legal and enforceable right now under the law.

But under State law, if a clause is set up in such a way that the consumer cannot effectively vindicate their rights; in other words, if a contract is set up in such a way that consumers are never going to be able to go forward, then those contracts can be struck down as unconscionable.

So AT&T's contract had all of these provisions. They said they limited the remedies you could get, they shortened the limitations periods below the consumer protection laws, they had a secrecy provision, they required the consumers to pay thousands of dollars to arbitrate significant claims, but they also banned class actions, and we argued that the ban on class actions was going to prevent people from effectively vindicating their rights.

So we went forward, and we took discovery of class actions that had previously been brought against AT&T and other long-distance companies. There were a number of cases where consumers have recovered millions of dollars from the phone companies. In several of these cases, AT&T had actually paid out 100 cents on the dollar to give you a sign that these were meritorious cases, that these were not sham cases.

AT&T basically stipulated that none of those cases could have been brought on an individual basis. Rather than have us bring in all of the lawyers in these cases and to establish this through testimony, they just walked away from that issue and just acknowledged none of these cases could have been brought on an individual basis. They would have been able to keep all of that money, and all of those people would have been ripped off successfully without those class actions.

At the same time, I have seen some incredible abuses of the class action process. I have seen cases where 99 percent or more of the consumers would get nothing from the case. They would get no money at all. I have seen cases where the defendant would walk away from a fairly serious scam without paying out anything and that the company would walk away free and that the only people who would get money would be the lawyers on both sides, as the chairman points out.

Our firm has broken up a number of these deals. We force parties to fix these deals. We have come into cases and slashed the attorneys' fees by more than 50 percent. We have come into some of these cases and gotten judges to completely rework them so that the coupons would be thrown out and instead there would be guaranteed sums of money given to the plaintiffs.

But the key to beating these cases is the judges. The judges really have all of the power in this, and they have the tools to do this under existing law, but a lot of judges do not really take the effort to exercise that, and the biggest factor in this is how burdened the judges are and how much is going on.

A quick case in point, is the case that we got involved in, in Chicago, where a Federal court had a coupon settlement before it. It was the case where the escrow for a bank had supposedly been set up unfairly in order to rip off the consumers and that the cases involved a very small amount of money, maybe $10 per person. So there was going to be a coupon that if you took out another loan with the bank, you would get a small reduction off your closing costs.

The only way you would find out about the coupon was if you got the New York Times because that is where it was advertised. That is where the notice was for the vast majority of the plaintiffs, but the class of people was in Texas, was banking out of Texas. So to get anything from the settlement, you had to buy the New York Times , which is not that common for Texans, right? Then you had to find the settlement on Page C–38. It is an eighth-of-a-page ad, little, tiny print. So you would have to be a really aggressive Texan to find this, and then you had to go out and take out a new loan for over $100,000 to get 100 bucks back.

We objected to this settlement. It was approved by the Federal court in Chicago. It was approved by the Seventh Circuit Court of Appeals. The trial judge entered an order sealing the redemption rates to find out how many people ever use the coupons, and the main reason this happened was because the same Federal court had 50 identical class actions in front of it. If the court was going to decide these cases, it would have taken them forever. The court was overburdened, and it let it all go, and that is what is going to

happen if these cases are pushed into Federal court in a lot of cases.

[The prepared statement of Mr. Bland appears as a submission for the record.]

Chairman LEAHY. Thank you. I am going to have to ask the witnesses to try to stay close to their time because we are going to have a series of roll call votes, and we are going to have to do this in kind of a rolling way. We have also been joined by Senator Carper from Delaware. I appreciate him being here.

Mr. Dellinger, please go ahead, sir.

STATEMENT OF WALTER DELLINGER, O'MELVENY AND MYERS, WASHINGTON, D.C.

Mr. DELLINGER. Senator Leahy, it was over 20 years ago that I first testified before this committee, but this is the first time I have had the pleasure of doing so with you serving as chair.

There is much that we agree about at this table this morning, Mr. Chairman, and with your statements. I think, having looked at the statements, there is widespread agreement that class actions are valuable. They are an indispensable tool for the administration of justice of allowing those with small claims to bring those claims together, and I do not think anyone disputes the value of class actions and the good that has been done by many class actions, nor I think is there disagreement, as Paul Bland noted, with the fact that there have been some very abusive situations.

What is at issue here is really not whether class actions are a good or bad thing, but where a certain category of class actions ought to be tried and what kind of rights for plaintiffs in class actions ought to be protected by a bill of rights. This is the single most critical point. This bill will not eliminate a single class action that satisfies the standards for basic fairness that are set out already in the Federal rules governing class actions. What it will do is to ensure that all nationwide class actions satisfy those basic requirements.

Now, if this committee were starting with a blank slate to decide what parts of the potential Article III jurisdiction ought to be actually conferred by statute on the Federal courts, cases covered by this class action bill would be among the very first to be included. Of course, you would start with giving Federal courts jurisdiction over the most important Federal laws, especially the civil rights laws where civil rights plaintiffs could be adversely affected by hostility by local prejudice, which is one of the reasons for having a system of lower courts.

But after that, in the category that the Framers of the Constitution carefully created to have a Federal court system, where the citizens of different States were affected to avoid even the appearance of local prejudice, cases involving citizens of different States, you would choose to accord Federal court access to those multi-State class actions, the large amount in controversy, that have national economic implications and potentially affect every single State.

The case for giving access to Federal Courts would be a compelling one even if there were no abuses of the kind that Senator Hatch mentioned, Senator Kohl, Mr. Bland, but that makes it criti-

cally important. It is not the case that State courts generally are a problem. It is not the case that State courts are incompetent or unfair or not to be entrusted because the problem can reside in a handful of State courts; indeed, in a handful of counties in State courts. There are 3,000 counties in the United States, and if only three of those counties are engaging in abusive practices, like one county where class action filings are up 1,850 percent over the past 3 years, what you have is a national bucket with three holes in it, and that is why it is a national problem, as it is adversely affecting the national economy.

There is no federalism interest served in confining these important national class action to local courts. Under federalism, each State decides for itself. Under multi-State class actions confined to State court, with no access to the courts of the Nation, the courts of one county in one State can determine the rights of those in all of the other States.

Let me be clear about this. The voters of California, and Vermont, and Alabama, and West Virginia, and Wisconsin, and Delaware had no voice whatsoever in choosing the State court judges in Madison County, Illinois, or Jefferson County, Mississippi, courts that are using national class actions to determine the rights and affect the rights of citizens in all of those States.

As much as I respect my colleagues here, and Paul Bland and Tom Henderson who address the issues I address are outstanding lawyers, their argument will basically come down to a single word, "burden"; that there is too great a burden on the Federal courts, and therefore the Federal courts will be more likely to approve abusive settlements or it will squeeze out civil rights cases.

The Federal judges disagree. The two committees of the Federal judiciary who have addressed this problem have said quite clearly and emphatically, the Advisory Committee on Civil Rules, cases of nationwide scope could be brought into Federal court with unduly burdening the Federal courts or invading State control. Large nationwide and multi-State class actions, say the judges on the Advisory Committee, are the kind of national litigation consistent with the purposes of diversity and appropriate to the jurisdiction of the Federal Courts.

Having courts available allows capital from the whole Nation to be invested anywhere in the Nation with the assurance that you will get a fair, neutral, national judge.

Thank you.

[The prepared statement of Mr. Dellinger appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Dellinger. As always, we appreciate your testimony—I might say that not only the testimony you gave here, but as I said, many, many Senators on both sides of the aisle have had the opportunity to call you and ask you for your advice and opinion.

Mr. Henderson, you are also no stranger to the proceedings here, and we appreciate you being here.

Please go ahead, sir.

STATEMENT OF THOMAS J. HENDERSON, CHIEF COUNSEL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Mr. HENDERSON. Thank you, Mr. Chairman.

As indicated, I am chief counsel for the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization formed at the request of President Kennedy to involve the private bar in providing legal services to address racial discrimination and its victims.

I would like to thank the chairman and the members of the committee for holding these important hearings on class actions and for providing the opportunity for us to provide our analysis of this legislation on civil rights litigation and our clients across the country.

The Lawyers' Committee also exclusively brings class actions in Federal court, seeking injunctive and monetary relief. Class actions are essential to the enforcement of the Nation's civil rights laws and are often the only means by which persons can prove and obtain relief for this systemic discrimination.

The mission of the Lawyers' Committee does not involve State tort, contract or consumer law. We could simply have remained simply a bystander in what might appear to be another monumental dispute about tort reform, but this legislation is not about tort reform; rather, it concerns the role and availability of the courts and of class actions and of the access to justice for those who have no alternative but to rely on the courts for the protection of their rights and freedoms.

It is our belief that the proposals referred to as the Class Action Fairness Act are unjustified and unjustifiable attempts by Congress to impose Federal judicial regulation on matters of law committed to the States under our Constitution. The legislation would result in wholesale removal of State law class actions from State courts to the Federal courts. This would represent an epic reallocation of judicial responsibility that will further impair the ability of Federal courts to carry out the essential functions they are to serve under the Constitution.

The legislation will substantially expand the caseload of the Federal courts to include hundreds, if not thousands, of complex cases that do not involve questions of Federal law. The Federal court dockets are already significantly overburdened, and those courts are ill-equipped even to handle the volume of cases now on their dockets. Imposing substantial numbers of new cases on the modest numbers of Federal judges we have will clog their dockets, making it more difficult to have any and all cases decided. Moreover, this legislation would also increase the number of complex and therefore time-consuming cases that those courts must decide.

Empirical studies have shown that class actions, on average, consume almost five times more of the judicial time that typical civil cases. Overburdened dockets will exacerbate pressure to improperly dispose of cases by dismissal, a problem that particularly affects civil rights cases and which the Supreme Court has consistently sought to correct. In many districts, it is already difficult for civil rights plaintiffs with meritorious cases to survive even pretrial motions and have the opportunity to go to trial. Compressing virtually

all substantial class actions in the Federal court and imposing additional burdens on their prosecution would also increase pressure on courts to dispose of class actions by denying certification altogether.

Although Congress determined that victims of discrimination have damage remedies available, that enforcement of the law required that victims have damage remedies available, some Courts of Appeals have interpreted class action rules to make certification rare, if not impossible, where these congressionally mandated remedies are sought.

The legislation also creates additional problems, both the Senate and House bills would impose difficult and costly notice requirements to Federal and State officials that will further complicate and delay disposition of class actions without corresponding benefits.

Further, the outright prohibition on settlements in which named plaintiffs receive amounts different from class members is not reasonable in all instances and prohibiting complete relief to named plaintiffs would deter people from playing that role and therefore defer class actions.

The bill passed in the House would go even further and particularly target adversely civil rights cases, resulting in the dismissal of a number of those cases because they would be required to plead specific facts and yet be denied discovery of the opportunity to obtain those facts.

Further, it would impose mandatory appeals of interlocutory class action certification decisions, and that makes no sense. There is now a provision for discretionary review of those orders.

I thank you, Mr. Chairman.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Henderson.

Mr. Mirel, thank you for being here. Is it Mirel or Mirel?

Mr. MIREL. It is Mirel.

Chairman LEAHY. Mirel.

Mr. MIREL. Thank you for asking.

Chairman LEAHY. I like to make sure I get them correct, and you do a great service in coming here to testify, and I appreciate you being here. Please go ahead.

STATEMENT OF LAWRENCE H. MIREL, COMMISSIONER, DEPARTMENT OF INSURANCE AND SECURITIES REGULATION, DISTRICT OF COLUMBIA, WASHINGTON, D.C.

Mr. MIREL. Thank you, Mr. Chairman and members of the committee.

My name is Lawrence Mirel. I am commissioner of Insurance and Securities for the District of Columbia. As you know, the business of insurance is regulated primarily by the States. Although the District of Columbia is not a State, I have the authority of a State insurance commissioner, and I am a full and active member of the National Association of Insurance Commissioners, although I am speaking today on my own behalf and not on behalf of the NAIC.

The laws that we enforce in our department are laws that were passed primarily by this Congress between 1900 and 1974 and by the Council of the District of Columbia, with the approval of the Congress, since 1974.

I am concerned with the impact of class action lawsuits against insurance companies that limit and interfere with my ability, and the ability of my State insurance commissioner colleagues, to carry out our statutory duties. These duties include protecting the public and assuring that insurance is available to, and affordable by, consumers.

As State insurance Commissioners, our primary function is to protect the public. I, and my colleagues, see ourselves as consumer advocates, and the laws we administer give us that responsibility and authority. Our expert staffs are knowledgeable about the stringent laws that govern the operations of insurance and about the complex financial rules that insurance companies must follow.

We receive and act upon consumer complaints against insurance companies. We make sure that insurance contracts are fair, understandable, and in accordance with the law. We go after companies that do not treat their customers properly or that are engaged in fraud, and that we have substantial legal authority to do this.

Large-scale nationwide litigation against major insurance companies frequently goes around or simply ignores the rule of State regulators. Class action lawsuits against insurers can, and often do, directly impact our statutory authority to regulate the business of insurance and to protect our constituents.

Moreover, these suits, whether successful or not, can have a major effect on the cost, and even the availability, of good insurance products to the public. That is because they are frequently designed to produce a small, sometimes negligible benefit to a large class of policyholders, and incidently large legal fees to the lawyers who bring them, without regard to the impact on the insurance market as a whole and the cost to the insurance-buying public.

Consider some of these examples. In Texas, two of the State's largest automobile insurance companies decided to settle a $100-million class action lawsuit brought against them over a long-standing, industrywide practice of rounding up to the nearest dollar for auto insurance premiums. Although the insurance premiums were calculated according to specific instructions from the Texas Department of Insurance, because of mounting legal expenses and negative publicity, the companies decided to settle for $36 million. The policyholders received funds of about $5 apiece, while the lawyers took home almost $11 million.

More than 20 nationwide class action lawsuits are currently pending in one or two New Mexico trial courts, claiming that insurance companies are misleading policyholders by not disclosing the annual percentage rate, the APR, of the fees charged for processing installment payments and premiums. In the District of Columbia, and in most, if not all, States, companies are allowed to charge small processing fees for allowing customers to make these modal payments on their annual premiums, so long as these charges are disclosed and are reasonable. They are simply a convenience to consumers.

There has never been a complaint about them in the District of Columbia or in any other jurisdiction so far as I know, but facing potential billions of dollars in liability costs, as well as the threat of massive costs of defending themselves, these insurance companies are under tremendous pressure to settle. One modal premium case against Primerica has already been settled, with $7.5 million paid to the plaintiffs' attorneys and nothing to class members at all.

There are other examples which are mentioned in my testimony, but I do want to say that I am pleased that this committee is considering the issue and that it is considering this bill, which is a good start, in my view, toward dealing with some of these problems. The bill, in particular, I am pleased does provide notice to State regulators, such as myself, and that, I think, is important because we need to understand what is happening out there. Because when these lawsuits are won or when they are settled for large amounts of money, that money is paid by consumers. They are the ones who end up paying, that are engendered by insurance companies to pay the settlements or the judgments. There is no magic pot of money out there. It comes right from the pockets of the consumers who pay insurance premiums.

So thank you for allowing me to testify today, and I appreciate the work that this committee is doing.

[The prepared statement of Mr. Mirel appears as a submission for the record.]

Chairman LEAHY. I thank you very much for being here.

Our next witness is Ms. Shaneen Wahl. If I might just note parenthetically, and as a personal thing, I commend you for your courage in battling both breast cancer and your health insurance company at the same time, and winning both of them.

My wife and I were honorary chairs of the Race for the Cure this past weekend in Vermont, and it was very satisfactory to see so many old friends who have battled breast cancer and won. I just mention that for anybody that might be listening. Do the exams your doctors tell you to, and for the men in the audience, do not forget men can get breast cancer too.

Ms. WAHL. That is true.

Chairman LEAHY. Go ahead, Ms. Wahl.

STATEMENT OF SHANEEN WAHL, PORT CHARLOTTE, FLORIDA

Ms. WAHL. Good morning, Mr. Chairman and members of this committee. I feel very special that you have invited me here to speak today. My name is Shaneen Wahl, and I am about to turn 53 years old, and soon thereafter I will achieve my sixth year as a breast cancer survivor.

In the early 1990's, my husband's job as a VP of Sales and Marketing for a large home builder ended, and he was unable to find another acceptable job during the real estate crunch. Nobody wanted a guy in his mid-fifties. We had been faithfully saving for our retirement since we were married over 27 years ago. At that time, we examined our finances, and it appeared that we would really be able to retire early. We confirmed our determination with a financial planner. What, at first, had appeared to be a catastrophe turned out to be the beginning of our American dream.

We knew that as a part of retiring, we would need health insurance, so we purchased a policy in 1993 from American Medical Security. We bought an RV and began traveling, and our dream had become a reality. The premium for our zero-deductible policy in 1993 was $194 per month. In September 1996, I was diagnosed as suffering from breast cancer. That was the beginning of our American nightmare. By the time of our 1998 renewal, the monthly premium had risen 300 percent to $588.

Late in 1998, we received a letter from American Medical Security telling us that we would be canceled, but if we would reapply, we would be guaranteed a new policy. So we did that. At that next renewal, we received a notice that our monthly premium for our new policy, with a $500-each deductible, would be $1,180.

Chairman LEAHY. A month?

Ms. WAHL. A month. Most people assume it is a year.

I began making phone calls and writing letters. I could not believe what had just happened. I was told by Florida's Department of Insurance and other departments of insurance that they had no laws that would prohibit American Medical Security or, for that matter, many other health insurers, from charging such predatory premiums.

American Medical Security had chosen to circumvent Florida State regulatory and Federal laws by using a loophole in the Florida insurance law to permit out-of-State group health insurance companies to exempt themselves from regulation. We bit the bullet and paid the $1,180 each month, since I could not go to another insurance company because of my breast cancer history.

Then, in August of 2000, we received the next premium increase, $1,881 per month, and that is over $22,000 per year. I was livid. My husband and I drove to American Medical Security's home office in Green Bay, Wisconsin, to challenge the increase since there was no one in Government who could help me.

I knew then that I could not just sit there and let this happen to me and to other families. I had to do something. I became my own advocate, and I began my effort to get the laws changed, and that same determination is what brings me here today. My hero, Florida's Commissioner of Insurance Tom Gallagher, has been working since 1993 to pass laws that would put a stop to the egregious tactics my insurance company is using. His hands have been tied due to the aggressive lobbying by health insurance companies and their deep pockets that allow them to hire the big-gun, high-priced corporate attorneys to fight any change to State laws.

Tom Gallagher is a hero, but the Department of Insurance initially lost its regulatory action before an administrative law judge. Last week, Tom Gallagher did suspend American Medical Security's license to do business in the State of Florida for 1 year. That, however, has been reversed temporarily since the insurance company did go to court just a couple of days ago, and they are back in business.

Commissioner Gallagher's action is a very positive move toward bringing insurers under the law. However, it really just amounts to a very, very large fine, and it does nothing to help the policyholders like me recover millions of dollars lost due to American Medical Security's outrageous conduct.

My attorney, Jeff Liggio and his team won the Florida class action against American Medical Security, and they will recover the money we, and the other members of the class, lost as a result of the company's greed and misconduct. State class actions allow consumers to take on the big and powerful corporations. Class actions can, and do, accomplish what our statutorily and budgeted-limited public servants, even the great ones like Tom Gallagher, cannot.

As it is, people who have been wronged by these insurance companies are morbidly fearful of coming forward to complain. They think that they will be further penalized in their premiums if they do. Some even fear bodily harm. They also think that they do not have the means by themselves to take on the big insurance companies and their high-priced corporate attorneys to fight for their rights and be reimbursed of what they have lost.

If you take away the option of being able to use the vehicle of a State class action or make it so difficult that it will no longer be a viable process, the people who are victims of corporate wrongdoing will be powerless and hushed even further, and that is what these insurance companies want. They want the people they have wronged to just disappear.

I thank you and would be happy to answer any questions.

[The prepared statement of Ms. Wahl appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

What has happened, as you can hear by these bells, we have a roll call vote in, this bell indicates, approximately just a little over 5 minutes left in this roll call. That would give us time, first, to hear Ms. Bankston, who has been waiting here patiently, and so why do you not take your 5 minutes now, Ms. Bankston, and if the Senators have to go vote, feel free. I will hear that, and then we will recess while we vote until we come back. Go ahead.

STATEMENT OF HILDA BANKSTON, JEFFERSON COUNTY, MISSISSIPPI

Ms. BANKSTON. Thank you, Mr. Chairman and members of the committee. I am so pleased to be here today to have an opportunity to share with you what has been a personal nightmare for me since I faced my first class action lawsuit in Mississippi.

While I have never been a plaintiff in any class action lawsuits that I know of, I do believe I have been a victim of the system since the first suit was filed against Bankston Drug Store in 1999. Let me explain. My husband and I lived the American dream until 3 years ago, when we were caught up in what has become an American legal nightmare.

I was born in Guatemala and moved to the U.S. in 1958. I met my husband Mitch, a Navy seaman, while I was serving as a Marine at Camp Lejeune in North Carolina. We were married there in 1964. After we left the military, Mitch attended college and pharmacy school at Ole Miss while I worked as a seamstress. In 1971, we put down roots in Fayette, Mississippi, bought a local drugstore and fulfilled Mitch's lifelong dream. He worked hard and built a solid reputation as a caring, honest pharmacist. We raised two sons. Our life was good.

Then, in 1999, we were named in the national class action lawsuit brought against the manufacture of Fen-Phen. Let me stop here to explain why we were brought into this suit. While I understand that class actions are not allowed under Mississippi State law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. We filled prescriptions of these FDA-approved drugs for patients in Jefferson County. We kept accurate records of prescriptions dispensed for 5 years, as required by law, providing the trial lawyers with a data base of potential clients.

By naming us, the only drugstore in Jefferson County, the lawyers could keep the case in a place known for its lawsuit-friendly environment. I am not a lawyer, but that sure seems like a form of class action to me. It is my understanding that legislation before the Senate will cover Mississippi consolidations, like those I have been named in, as well as national class actions filed in other lawyer-friendly State courts.

From the moment we learned that we had been named as a defendant in the Fen-Phen case, Mitch became extremely concerned about what our customers would think. In our small town, news travels fast and reputation is everything. Within 3 weeks, my husband, a 58-year-old in good health, died suddenly of a massive heart attack. In the midst of my grief, I was called to testify in the first Fen-Phen trial.

Since then, Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by the individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-Phen, Propulsid, Rezulin, Baycol. At times, the bookwork became so extensive that I lost track of the specific cases, and today, even though I no longer own the drugstore, I still get named as a defendant time and again.

Jefferson is a poor county, and the attorneys handling these claims have aggressively marketed their actions, the same as winning the lottery. Some days I cannot open the newspaper without seeing ad after ad recruiting potential plaintiffs with a warning that "time is of the essence" if folks want the promise of big payouts. Nor are their efforts hurt by rumors that five plaintiffs in the first Fen-Phen case split $150 million. Plus it is well-known in the community that trial lawyers point to multi-million-dollar homes that are built by successful lead plaintiffs as an inducement for signing on.

Sadly, the lawsuit frenzy has done more harm than good to our community. Businesses will not relocate to Jefferson County because of fear of litigation, and the county's lawsuit-friendly environment has driven liability insurance rates through the roof, giving small business owners all over Fayette additional headaches they do not need, an dour doctors are leaving the State en masse.

No small business should have to endure the nightmares I have experienced. Class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I have searched record after record and made copy after copy for use against me. I have had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neigh-

bors wondering what we did to end up in court so often, and I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it.

I am not a lawyer, but to me, something is wrong with our legal system when innocent bystanders are used by lawyers seeking to strike it rich in Jefferson County or anywhere else.

In closing, I would like to ask you to think about the victims of lawsuit abuse. My husband Mitch and I are only two of thousands throughout this country. It is not just small business like ours, but it is also the plaintiffs who end up with nothing or consumers who pay more for products or for insurance. We are the ones who need your help.

I urge you to pass legislation that reforms our legal system and prevents lawsuit abuses such as those that have plagued by business and my family for years.

Thank you for your attention. I will be happy to answer any questions.

[The prepared statement of Ms. Bankston appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Ms. Bankston, for your testimony. Of course, everybody hearing it has to feel the same. We regret your loss of your husband. You are absolutely right. At that age, that is far too early and far too great a loss.

I will put some statements of other Senators in the record, including Senator Feingold.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman LEAHY. We will take a recess at this point so we can go vote and then come back.

Senator FEINSTEIN. Mr. Chairman, four votes.

Chairman LEAHY. We still have to go and vote, and then as soon as some can come back, we will just have to figure out how we do this.

Thank you. We stand in recess.

[Recess.]

Chairman LEAHY. In order, just so everybody will understand, we are having a fairly large series of votes, which sometimes happens the week before the recess. Senator Kohl is still back there.

I am going to turn to Senator Feinstein, who has questions, and we have, as those of you who are used to voting here know, that we have also the ability to submit questions for the record, and we will keep the record open for a few days to do that, but as I also mentioned just now during the break how much I appreciate each of you coming here.

Senator Feinstein and I were talking on the way over to the vote about how valuable everybody's testimony has been and how interesting it has been.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I echo your comments, but I must tell you I think the two women really had the long and the short of the argument, in very elo-

quent, crystallizing and dramatic terms. I think we saw clearly, through Mrs. Wahl's testimony, the clear need for class action. She could not have brought the case on her own.

On the other hand, we saw the clear need for reform in your testimony, and just my profound sorrow over the loss of your husband. I really understand how the humiliation and the tragedy can enter into what happened, but there we saw Fen-Phen, a nationally distributed product, where the case is brought in a county that is notorious for forum shoppers, and it should not have been in that county. The Fen-Phen case, in my judgment, should have been in Federal court because it impacts everybody. It is interstate commerce. It goes all over the United States.

The question that I have, and Mr. Dellinger, as you know, I am a fan of yours so I read your written remarks, and you mention on the last page of your written testimony the very point I am trying to make. I do not know whether the criteria in the Kohl-Grassley legislation are the right criteria. One person outside of the State in a case that is worth more than $2 million, I do not know whether that should be kind of the arbitrary decider of what goes into Federal court.

Using the case over here with Fen-Phen, should it not be based really on the subject matter of the suit, the product involved, whether it is an interstate situation or whether it is not? Even that I can see is faulty, but the one-case standard, the one-petitioner standard, I do not know if it holds water. Could you comment on that?

Mr. DELLINGER. Yes, I will, Senator Feinstein. If I may, let me first agree with you that I thought that the testimony we heard this morning from Ms. Bankston and Ms. Wahl were both very, very compelling, and the remark you made to us that their testimony was what really focuses it on the two kinds of cases, so that I do think that is the proper focus, but I want to note that I think that this bill would have made a difference in one of those compelling stories and not necessarily in the other.

We are all grateful that Ms. Wahl got justice achieved through her class action, but there is no reason that we know to believe that if someone had chosen to remove that to Federal court that Federal judges appointed by the Presidents and confirmed and reviewed by this committee, would not have also given her fairness in that case.

On the other hand, we know that Ms. Bankston's story would have been alleviated by this bill because she would never have been joined as a defendant, except that it is now done to manipulate the cases to avoid Federal jurisdiction; for instance, you say a case like Fen-Phen.

I think the question you raise is, if I understand your question, it is suppose that all of the plaintiffs are from one State and just one plaintiff is from another State, should that be enough.

Senator FEINSTEIN. Right.

Mr. DELLINGER. It actually is the case that—or the case in which, say, all of the plaintiffs were from California, and the defendant is an Illinois company or a North Carolina company.

Senator FEINSTEIN. Right.

Mr. DELLINGER. I think that really goes to the heart of the diversity jurisdiction to allow cases like that to be brought into Federal court. If there were two auto drivers, and one of them suffered $80,000 in injury, it could be brought in Federal court. Here, where you have national capital and businesses and jobs being expended throughout the entire Nation, a critical part of allowing America to be the world's greatest common market was the assurance that if you were an out-of-stater, you always had access to Federal court, to a neutral court, not a court of the plaintiff's home State.

So, for a California business person that wants to invest in Mississippi or West Virginia or Illinois, they know that they will not have to be stuck in the local courts in those States if this bill passes and there is a class action. Even if all of the plaintiffs happen to be from that State, there is still the unfairness to the out-of-State defendant that it is the essential function of the diversity jurisdiction to avoid and to assure that you could expend your capital nationwide and not have to worry about unfair courts.

So I think that is why the bill is structured to allow a situation where one of the defendants is an out-of-State defendant to allow those cases to be removed to Federal court.

Senator FEINSTEIN. Would you allow me, Mr. Chairman?

Chairman LEAHY. Of course. Take whatever time you need.

Senator FEINSTEIN. Section 4 of the bill also states that a class action case would remain in State court if, and I quote, "the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed."

What is the legal meaning then of substantial majority?

Mr. DELLINGER. I do not think it is a number. If you wanted me to hazard a guess, I would guess 60 percent sounds substantial to me. What it is meant to do is to say, look, if there are cases that meet the minimal diversity requirements of Article III, but really substantially most of the plaintiffs and the primary defendants are from the case, and State law is going to be applied, that ought to stay in State court.

Senator FEINSTEIN. Got it.

Mr. Bland, do you believe that, for example, Ms. Bankston, that they should have been a defendant in a Fen-Phen suit?

Mr. BLAND. I do not know a lot about the Fen-Phen controversy. I certainly know that the manufacturer should have been defendants in those cases, and frequently the doctors and these diet clinics that were convincing, particularly women, to use these drugs that were approved for totally different purposes for diet——

Senator FEINSTEIN. This is a pharmacy that dispenses an FDA-approved drug.

Mr. BLAND. Well, it is approved for one purpose, and they are being dispensed, combined, for a different purpose. It is quite possible that the pharmacy should not be there. One way of testing that would be it would be fairly easy for the defendants to remove the case to Federal court and say it is a fraudulent joinder. The Federal courts in Mississippi are certainly not considered particularly liberal or friendly courts for consumer plaintiffs, and the Fifth Circuit, the Court of Appeals for Mississippi, also does not have

that reputation. If they were fraudulently joined, that would have been a good way of testing it.

But my understanding is that virtually all of the Fen-Phen cases, after our first few cases about medical monitoring, were not class actions. I mean, the type of case that is class action is typically a small case. The Fen-Phen cases are particularly women who are have heart valves that failed, Senator, and the Fen-Phen cases are significant personal injury cases, usually brought on an individual basis.

To the extent that the pharmacy was fraudulently joined and should not have been joined, it is being joined in a whole bunch of individual product liability cases, and I think you put your finger right on the key point when you said the jurisdiction should be based on the subject matter.

These are products liability cases. Products liability historically in America has been a State law body of action. If the purpose of this bill is to take a whole bunch of individual product liability suits where a lot of people are harmed by the same product and move them all into Federal court, then the bill is not just about class actions, but it is now going to be about every product that harms a lot of people.

So we could be talking about all of the cases involving Bridgestone tires are now going to be moved to Federal court, and all of the cases involving asbestos are now going to be in Federal court. I think the corporate defendants would like to have every single products liability case in Federal court because it takes forever to get them resolved, but if that is what the bill is doing, I think it is a real problem.

Senator FEINSTEIN. Let me ask you, as a hot-shot plaintiff attorney, how do you avoid forum shopping or do you think forum shopping is a good thing, particularly when somebody who at least on the appearance of what you said is just an innocent bystander so to speak?

Mr. BLAND. I agree that I think there is forum shopping on both sides, and I think, to some extent, some of the drive for this bill is forum shopping for people who feel they would be better in Federal court. I agree that it can be a real problem.

If people were naming a pharmacy wrongly, there are a lot of big defendants in those cases with a lot of lawyers, too, who would rather have been in Federal court, they should have gone to Federal court and said it was a fraudulent joinder. The Federal courts in Mississippi have not been particularly friendly toward class actions or toward product liability suits in a lot of cases, and if they were fraudulently joined, they could have beaten it that way.

The other thing is that you cannot apply State law in one State to claims involving people in other States. Under the Supreme Court's decision in Phillips Petroleum v. Shutts, the Supreme Court said that due process says that you cannot apply Mississippi law to the claims of people in California, unless there is a substantial nexus, a real close tie between the law of that State and the other State. So California lawyers could not say, hey, let us go to Mississippi because they are a bunch of rubes down there, and we will be able to use Mississippi law, you know——

Senator FEINSTEIN. Or say that in any event.

Mr. BLAND [continuing]. And get away from people kind of thing, but that is sort of the premise that we are getting from the tort reform side I think you would have to say, is that people are going to the bad States kind of thing.

Senator FEINSTEIN. No, no, no.

Mr. BLAND. You could not apply Mississippi law.

Senator FEINSTEIN. That is not the issue.

Mr. BLAND. That is an argument some people are saying.

Senator FEINSTEIN. This is the issue where there is a sympathetic county jurist——

Mr. BLAND. A jury pool.

Senator FEINSTEIN [continuing]. That is the issue, and jury pool.

Mrs. Bankston, may I ask you this question?

Ms. BANKSTON. Yes, ma'am?

Senator FEINSTEIN. This issue of separating you out, did you, and your husband, and your attorneys try to do that? And, if so, what happened?

Ms. BANKSTON. I do not believe that we had an opportunity to go to Federal court.

Senator FEINSTEIN. No, but did they try to raise the issue that Mr. Bland just mentioned, that it is possible to separate you out as a kind of—what is the legal term, false——

Mr. BLAND. You remove a case. The defendants, what they would have done is they would have said this case should not be in State court, we remove it to Federal court, and all they have to do is file a petition, and it automatically happens, you are in Federal court. And then if the plaintiffs think they should not be in Federal court, they have to fight to get back into State court. They have to make a motion asking the judge to remand them, and those frequently take years.

Senator FEINSTEIN. Was that done in your case?

Ms. BANKSTON. No, ma'am. I believe that if my attorney would have had the opportunity, I am sure he would have done something like that because we tried every way possible to where I would not be included even on the first one. And then whenever hundreds and hundreds came in, well, since I am not an attorney, I am just at the mercy of my attorney which I trust very much, and he has been very good, but I do not think there was an opportunity to do it or he would have done it.

Mr. DELLINGER. Senator Feinstein, the problem is not——

Chairman LEAHY. I would note we have got about 4 minutes left on this vote, and I want to get my questions asked.

Mr. DELLINGER. The problem is not fraudulently joined, but the present rules, the way diversity jurisdiction is now set up, a nonfraudulent joinder of someone like Ms. Bankston, under the law, will defeat the ability to remove this case to Federal court or keep it from being removed there where she would not—nobody would be interested in having her as a party. The problem is the rules allow the joinder. It is not fraudulent.

That is the very rule that we would effectively change by allowing Federal jurisdiction. There would be no reason to include her. It is true that she could have gotten out if it were shown to be fraudulent, but the problem is the nonfraudulent joinder, where you have just got some plausible claim to put in the pleadings

about the drugstore. That is not a fraudulent joinder, and the case is stuck in State court, and that is why she is brought into it, just to do that, and the rules allow it.

Senator FEINSTEIN. Thank you. That is very helpful.

Thanks, Mr. Chairman.

Chairman LEAHY. Thank you. Apparently, they made this a 10-minute vote.

I will put a letter from the Conference of Chief Justices for State Courts wrote to Congress. They said that, among other things, that "This legislation is so drastic a distortion and disruption of traditional notions of judicial federalism it is not justified. We have heard only anecdotes of isolated problems that are being addressed on an ongoing basis by State judicial and legislative bodies. We believe strongly that there is no rational basis for drastic an invasion of State judicial prerogatives."

I realize there are those who disagree with them, and that is understandable.

Professor Dellinger, would this legislation cover the consolidation of individual lawsuits in State courts, not just class action litigation? Sometimes in State court you might have two or three people suing, and they consolidate those. Would this allow that transfer?

Mr. DELLINGER. Only if it is more than 100, Senator Leahy, it is my understanding, if it is more than 100 and it meets the other requirements of the bill.

Chairman LEAHY. Who are you representing today?

Mr. DELLINGER. The Chamber of Commerce has asked me to appear. Thank you.

Chairman LEAHY. Mrs. Bankston, I know how difficult it can be to run a small business. My parents had a small printing business in Montpelier when I grew up. We lived in the front. The house was in the front, the business was in the back, and you walked through the kitchen door to get to the business, and I know how difficult even the paperwork can be.

I am still not quite sure why you were not removed as a defendant in this case. I am going to ask the staff check that further because obviously the $150-million judgment they got against American Home Products, the maker of Fen-Phen, I do not think anybody expected to get that from you or your late husband, and I am just wondering why you were not separated out.

But having said that, I know that we have reached the time. Senator Sessions will offer material, probably not the whole transcript, but a letter from Karen Kovacs.

[The letter appears as a submissions for the record.]

Chairman LEAHY. We will have available the transcript of the Maddox v. Alltell Mobile Communications case. I would have to talk to Senator Sessions about the cost of reprinting that in the record, and I am getting a signal that we have got about 3 minutes left on this vote.

So, with that, I would thank all of you for being here. Frankly, I agree with the Senator from California, and this is not in any way to detract from Mr. Bland, Mr. Dellinger and Mr. Henderson or from Mr. Mirel, your testimony is all very, very valuable, but Ms. Wahl and Ms. Bankston really had the polar ends of the issue

we are facing, and I appreciate both of you being here, as I do you four.

We will leave the record open for a week.

We stand in recess.

[Whereupon, at 12:10 p.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

SENATE COMMITTEE ON THE JUDICIARY
HEARING ON CLASS ACTION LITIGATION

Responses to Written Questions from
Senators Orrin G. Hatch and Charles E. Grassley to Walter Dellinger

Question No. 1:

Mr. Dellinger, some claim that S. 1712 would unfairly inhibit plaintiffs from pursuing legitimate class actions. Do you agree?

Answer to Question No. 1:

No. S. 1712 would not hamper the filing – or litigation – of valid class actions. The legislation would not prohibit any class action from being filed, since it does not address ***whether*** class actions may be brought. Indeed, it does not alter substantive law at all; it makes no changes in any person's rights or ability to assert claims. Instead, it addresses only ***where*** a particular type of class actions may be adjudicated – namely, interstate class actions that involve plaintiffs and defendants from several states and that call for the interpretation and application of the laws of multiple states. To be sure, this may mean that some class actions currently being certified by some state courts will not be heard as class actions – but only those that should not be class actions, because they do not satisfy the basic requirements of fairness and due process too often ignored in those courts.

Inherent in this question is a suggestion made by some critics of S. 1712 that the legislation is intended to move class actions into federal courts because those courts simply will not certify cases for class treatment. Let me assure you that is definitely not the case. In that regard, I invite your attention to Attachment A, which is a list of exemplar cases in which federal courts have certified classes during the past 2½ years. (Let me stress that this is just an exemplar list; it is not an exhaustive list of all such cases.) The lists contain numerous cases, demonstrating that removal to federal court is not a dead-end for legitimate class actions.

Question No. 2:

Mr. Dellinger, in his testimony, Mr. Bland appears to claim that federal courts are so "severely overburdened" that they provide even less judicial oversight of class action litigation and settlements than state courts. What are your views?

Answer to Question No. 2:

The federal court workload issue has been greatly overstated by critics of this bill. Newly released data indicate that through the diligence of our federal judges, there has been a 7.2 percent decrease in the number of civil cases pending in our federal district courts nationwide

since 1997.[1] And the number of new diversity jurisdiction cases filed in federal courts has decreased by more than 11 percent since 1997.[2]

Moreover, in making this argument, Mr. Bland and other critics of the bill have completely ignored the workload that state courts confront. Civil filings in state trial courts of general jurisdiction have increased 28 percent since 1984 (versus only a four percent increase in the federal courts).[3] As a result, the average state court trial judge is assigned an average of 1,000-2,000 new cases each year.[4] In stark contrast, each federal judge was assigned an average of only 454 new cases last year.[5]

Those urging workload concerns also ignore the fact that S. 1712 does not require that interstate class actions be heard in federal courts. It simply provides the option for either side to litigate in federal court if it so desires. In jurisdictions where the state courts provide a relatively level playing field, there is no reason to believe that all class actions will be moved to federal court.

Critics also overlook the fact that even if both court systems were similarly burdened, federal courts could still deal with class actions more efficiently for two reasons. First, federal courts can coordinate "copy cat" or overlapping class actions. It is not uncommon to see 20, 30 or even 100 class actions filed asserting essentially the same claims on behalf of the same purported classes. Sometimes, these cases are filed by competing lawyers; other times, they are filed by the same lawyers who are simply forum-shopping for the most receptive judge. When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness. Defendants are forced to defend the same case in many different courts. And class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers. In contrast, if overlapping or similar class actions are filed against the same defendant in two or more different federal courts, the multidistrict litigation process (established by 28 U.S.C. § 1407) permits the transfer and consolidation of those cases to a single judge. The federal court multidistrict litigation system regularly consolidates multiple overlapping class actions in this manner, preventing the waste that occurs in state courts.

Second, federal judges typically have greater resources for dealing with huge, complex cases, like class actions. For example, federal court judges usually have two or three law clerks; state court judges often have none. And federal court judges usually can delegate aspects of their

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1 *See* Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 16 (2002) ("JUDICIAL BUSINESS").

2 *Id.* at 24.

3 B. Ostrom, EXAMINING THE WORK OF STATE COURTS 15 (Court Statistics Project 1998).

4 *Id.* at 12-13.

5 Administrative Office of the U.S. Courts, 2001 FEDERAL COURT MANAGEMENT STATISTICS 167 (2002).

cases (*e.g.*, discovery issues) to magistrate judges or special masters; state court judges often lack such resources.

Question No. 3:

Mr. Dellinger, in light of the recent corporate scandals, various critics have asserted that S. 1712 will make it easier for corporations to evade responsibility for wrongdoing. How do you respond to this criticism?

Answer to Question No. 3:

I have heard these criticisms, and they are understandable. However, I believe that these concerns are not well founded for several reasons. First, S. 1711 is a procedural/jurisdictional bill. It does not address whether class actions may be brought, and it makes no changes in any person's rights or ability to assert claims. Thus, there is no reason to believe that it will have any effect on the fate of class actions regarding corporate responsibility. Second, most class actions related to corporate responsibility are brought by shareholders under federal securities laws or by employees under federal retirement laws – and are therefore already subject to federal court jurisdiction. For example, the numerous class actions pending in federal court against Enron and WorldCom were generally filed in (or removed to) federal court. The bill would therefore have no impact whatsoever – even jurisdictional – on such cases, since they are typically brought pursuant to federal law.

Question No. 4:

Mr. Dellinger, is there any reason to think federal courts are unfair to private plaintiffs, or biased in favor of corporate defendants?

Answer to Question No. 4:

I have heard critics of this bill argue that federal courts would be biased in favor of corporate defendants but they have offered ***no*** empirical evidence to support that claim. Indeed, as I noted in response to Question No. 1 (and in Attachment A), the hard data indicate that federal courts frequently certify cases for class treatment – legitimate cases that meet the applicable due process-grounded class certification prerequisites.

In contrast, I am concerned that there is abundant empirical evidence that in certain state courts, the rights of truly injured individual plaintiffs, as well as the rights or corporate defendants, are falling victim to manipulation, and even evasion, of settled rules. For example:

- The HARVARD JOURNAL FOR LAW AND PUBLIC POLICY study of state court class actions indicates that class action counsel aggressively seek to file their interstate class actions in a handful of carefully selected county courts that have become

"magnets" for such cases, apparently because the judges have developed reputations as friendly to class actions.[6]

- Some state courts have routinely engaged in "drive-by class certifications," certifying classes before the defendant is even served with a complaint and given a chance to defend itself.

- Other state courts go through the motions of briefing and argument but employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment – even where federal courts have held that the very same claims do not meet the standard for class certification.

Finally, the suggestion that federal courts are somehow too biased to properly resolve civil claims is contrary to the critical role they play in our judicial system. After all, if federal courts cannot be trusted, why did the Framers and Congress designate them to preside over the most important controversies we face as a nation, including, most notably, Constitutional and civil rights cases? Indeed, the notion that state courts are more likely to dispense even-handed justice in class actions than federal courts is contrary to the very underpinnings of Article III, which provides federal judges with tenure and salary protection to prevent just such bias.

Question No. 5:

Mr. Dellinger, I have heard some critics of this bill say that it would take class actions away from state courts and force them into federal courts. Is that an accurate description of the jurisdictional provisions of this bill? Do you think that the bill would interfere with the affairs of state courts?

Answer to Question No. 5:

Absolutely not. S. 1712 would not "federalize" class actions and would not move virtually all class action litigation into the federal courts. As I explained in my testimony, S. 1712 would simply ***allow*** removal of certain interstate class actions to federal court – it would not require removal. If the state courts of a jurisdiction provide an even-handed forum for litigating class actions, defendants presumably will not remove new cases to federal court and will instead allow them to proceed in state court. That is how the system is supposed to work under the diversity jurisdiction provisions of Article III – to provide an alternative federal forum for litigation if the state courts of a jurisdiction are inhospitable to out-of-state defendants.

In any event, the suggestion that S. 1712 would infringe upon the traditional authority of the states to manage their own judicial business misperceives the nature of most state court class actions. In most state law-based class actions, the proposed classes encompass residents of multiple states. Thus, the trial court – regardless of whether it is a state or federal court – must interpret and apply the laws of multiple jurisdictions.

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[6] J.H. Beisner and J.D. Miller, *They're Making a Federal Case Out of It . . . In State Court,* 25 HARV. J. L. & PUB. POL'Y 143 (2001) ("*Federal Case*").

It is far more appropriate for a federal court to interpret the laws of various states (a task inherent in the constitutional concept of diversity jurisdiction), as opposed to having one state court dictate to other states what their laws mean. From a federalism viewpoint, is it logical for a state court judge elected by the several thousand residents of a small county in Illinois to be telling the state of Massachusetts what its laws mean? And why should an Alabama state court judge be rendering interpretations of Massachusetts's law that are binding on Massachusetts's residents and that cannot be appealed to or reviewed by Massachusetts's courts? These matters of interstate comity are more appropriately handled by federal judges appointed by the President and confirmed by the Senate.

In short, S. 1712 does not strip anything away from state courts. It merely allows the removal of certain cases to federal court as specifically authorized in the diversity jurisdiction provision of Article III of the Constitution.

Question No. 6:

Mr. Dellinger, I think that everyone would agree that this legislation would make some significant changes in the rules for diversity jurisdiction, at least when it comes to class actions. Do you believe that the record on this issue is sufficient to support making such a change? Has a real problem been demonstrated?

Answer to Question No. 6:

Over the past four years, there have been seven congressional hearings specifically on the subject of class action abuse. Each produced considerable evidence showing dramatic increases in the number of state court class action filings and demonstrating serious abuses among such cases. For example:

- A preliminary report on a major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts."[7]

- A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of state court class action filings had increased 1,315 percent – with most of these cases being nationwide or multi-state class actions.[8]

- The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and concluded that class actions

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[7] *See* Deborah H. Hensler, *et al.*, PRELIMINARY RESULTS OF RAND STUDY ON CLASS ACTION LITIGATION 15 (1997).

[8] *Analysis: Class Action Litigation,* Class Action Watch, Spring 1999, at 3.

"were more prevalent" in certain state courts "than one would expect on the basis of population."[9]

- That same study looked at where the money goes in class action settlements. The gathered data indicated that in state court consumer class action settlements, the class counsel frequently receive more money than all class members combined.[10] (Significantly, another study found that this phenomenon was ***not*** occurring in federal courts -- "[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins.")[11]

- Last year, an article published in the HARVARD JOURNAL FOR LAW AND PUBLIC POLICY identified certain "magnet" county courts in which the number of class action filings was increasing rapidly, in one county by 1,850 percent between 1998 and 2000.[12] A recent update of that article indicates that the tidal wave is growing even more intense.[13]

In light of this evidence, the suggestion that there is no state court class action problem is simply not credible. As the *Washington Post* has noted, "[n]o portion of the American civil justice system is more of a mess than the world of class actions" and "[n]one is in more need of the policymakers' attention."[14]

Question No. 7:

Mr. Dellinger, in your written testimony (p. 5), you expressed the view that some state courts were prone to approve class settlements arising out of situations in which "corporate defendants succumb to the pressure to resolve [a] case by agreeing to a settlement in which the individual class member recoveries are small (or even non-existent) in comparison to the fees paid to the lawyers." Are you aware of examples (in addition to those cited in your testimony) in which this phenomenon appears to have occurred?

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[9] Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999).

[10] *Id.* at 15.

[11] Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 68-69 (1996).

[12] *Federal Case,* at 161-64.

[13] J.H. Beisner and J.D. Miller, *Class Action Magnet Courts: The Allure Intensifies,* Civil Justice Report (Center for Legal Policy, July 2002).

[14] *Actions without Class,* Wash. Post, Aug. 27, 2001, at A27.

Answer to Question No. 7:

Yes. Attachment B is a list of reports of state court class action settlements in which it appears that the individual class members received small (or non-existent) recoveries in comparison to the fees paid to the class lawyers. In providing this list, I note that I was not directly involved in any of these cases and therefore cannot vouch for the details of the settlements. However, the press reports and other materials referenced in the list give strong indications that these cases fit the criteria I mentioned at the hearing.

Question No. 8:

Mr. Dellinger, it has been suggested by some critics of S. 1712 that federal courts generally do not certify cases for class treatment, such that removing class actions to federal court would effectively result in the termination of such cases. Are you aware of any empirical evidence that contradicts that contention?

Answer to Question No. 8:

Yes. As noted previously, Attachment A reflects exemplar cases in which federal courts have certified proposed classes over the past 2½ years. The numbers of the federal court class certifications on that list belie any suggestion that federal courts will not afford class treatment to legitimate, qualifying cases.

Question No. 9:

Mr. Dellinger, are there examples you can provide of proposed class settlements rejected by federal courts because they did not provide real benefits for class members and/or appropriate levels of inquiry by the supervising court?

Answer to Question No. 9:

Yes. I have attached as Attachment C a sample list of federal court decisions rejecting proposed class action settlements. In most of these cases, the settlements were rejected because the federal courts found that the "recovery" for plaintiffs was inadequate or non-existent and the fees proposed for the attorneys were too high.

Question No. 10:

Mr. Dellinger, during the hearing, it was urged that several categories of important class actions would not have proceeded if those cases had been heard in federal courts (instead of state courts)? Would you please respond to those arguments?

Answer to Question No. 10:

I have not seen any evidence that class action cases which meet the requirements of applicable class action rules are being rejected by federal courts, when they would be allowed by state courts. In fact, since the vast majority of states have adopted the federal class action rule

(Fed. R. Civ. P. 23) without material revision, the decision whether to certify a class should generally be the same, whether a case is in federal and state court. As I noted earlier, we trust our federal courts with some of our most important legal rights – such as protecting the Constitution and upholding our civil rights. Therefore, I find it strange when people suggest that we should not trust federal courts with class actions.

Question No. 11:

Mr. Dellinger, in Thomas Henderson's testimony (p. 7), Mr. Henderson suggests that federal court jurisdiction should be limited to matters involving a "federal question and interests subject to federal regulation." Further, he suggests that the federal courts should not hear "legal issues involv[ing] questions of state law among private parties." Isn't it true that the diversity jurisdiction provision of Article III of the Constitution was intended to give federal courts jurisdiction over certain claims that do not involve "federal questions" – that is, cases that involve only "questions of state law among private parties"? Assuming that to be the case, what response do you have to his testimony?

Answer to Question No. 11:

With all due respect to Mr. Henderson, his statements on this issue tend to contradict the intent of the Framers of the U.S. Constitution. As I indicated in my testimony, the Framers created diversity jurisdiction because they foresaw – and wanted to prevent – the very types of problems that are occurring in state court class actions. Unfortunately, the scope of diversity jurisdiction has been limited ***statutorily*** in a way that inadvertently excludes most interstate class actions from federal court – and that inadvertence is a major source of the state court class action problem.

Contrary to Mr. Henderson's suggestion, the Constitution specifically extends federal jurisdiction to include cases involving issues of state law, such as class actions, that are "between Citizens of different States." The Framers reasoned – and time has shown them to be prescient – that some state courts might discriminate against out-of-state businesses engaged in interstate commerce and that allowing these cases to be heard in federal court would ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes that did ***not*** involve issues of federal law. Moreover, diversity jurisdiction is a critical part of our federal legal system. As one federal appellate court judge noted in 1932, "[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."[15]

Thus, S. 1712 is not only constitutional; it actually would restore the intent of the Framers. The category of cases encompassed by S. 1712 clearly falls within the "judicial Power of the United States" set forth in Article III of the Constitution. As I noted in my testimony, the

[15] J.J. Parker, *The Federal Constitution and Recent Attacks Upon It,* 18 A.B.A.J. 433, 437 (1932).

only reason that class actions are currently excluded from federal court is that the modern-day class action device did not exist back in the late eighteenth century when Congress established the basic framework for determining which cases should be permitted in the federal courts under the Article III diversity jurisdiction authority. In fact, S. 1712 would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal – if not greater – force to interstate class actions. Class actions squarely implicate the Framers' concern with preserving national standards for regulating and protecting interstate commerce through the exercise of diversity jurisdiction. In fact, the substantial federal interest in protecting interstate commerce is an integral part of our constitutional history, as much of the impetus for calling the Constitution Convention stemmed from a general concern that the Articles of Confederation provided the federal government with too little authority to regulate interstate commerce. As Chief Justice Marshall recognized early on, the Commerce Clause embodies the substantial federal interest in regulating "that commerce which concerns more States than one," as distinguished from "the exclusively internal commerce of a State," which is more properly the concern of the states alone.[16] The large-scale, interstate class actions addressed by this bill will, in every instance, involve "that commerce which concerns more States than one."

Question No. 12:

Mr. Dellinger, during the hearing, it was suggested by some that federal courts have a larger caseload than state courts, move more slowly than state courts, are more likely to approve abusive class action settlements than state courts, and are more likely to dispose of cases through devices such as summary judgment than most state courts. Do you have any response to these claims?

Answer to Question No. 12:

These criticisms are not supported by the facts.

First, as noted previously, the caseload burden is even greater in state court than in federal court. As a group, state courts have experienced a much more rapid growth in civil case filings than have the federal courts. Civil filings in state trial courts of general jurisdiction have increased 28 percent since 1984 (versus only a 4 percent increase in the federal courts). Most tellingly, in most jurisdictions, each state court judge is assigned an average of 1,000 to 2,000 new cases each year. In contrast, each federal court judge was assigned an average of 454 new cases last year. Moreover, many state courts are tribunals of general jurisdiction – they hear all sorts of cases, including divorce matters, custody disputes, name change petitions, traffic violations, small claims contract disputes, minor misdemeanors, and major felonies. Thus, when a class action is filed before those courts, it diminishes the court's ability to provide a broad array of very basic legal services for the local community.

Second, the notion that cases move at a snailpace in federal court is baseless. In reality, the median time for final disposition of a civil claim filed in federal court is 8.7 months, and the

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16 *Gibbons v. Ogden,* 9 Wheat. 1, 194 (1824).

median time to trial in a civil matter in federal court is 21.3 months.[17] I am not aware of any empirical data supporting the proposition that on average, cases proceed more quickly in state courts than in federal courts.

Third, the judges presiding over federal courts cases have far more resources for dealing with huge, complex cases, like class actions. For example, federal court judges usually have two or three law clerks; state court judges typically have none. And federal court judges usually can delegate aspects of their cases (*e.g.*, discovery issues) to magistrate judges or special masters; state court judges typically lack such resources.

Finally, all the evidence that has emerged from years of studies and Congressional hearings points to a state court problem – there is no evidence that federal courts are regularly approving abusive settlements. Thus, critics who attack the bill on this ground have it backwards.

Question No. 13:

Mr. Dellinger, would you please comment on the likely effect, if any, that S. 1712 would have had on the cases of Shaneen Wahl and Hilda Bankston who testified at the hearing?

Answer to Question No. 13:

In listening to the testimony of Mrs. Wahl and Mrs. Bankston, I was struck by the fact that S. 1712 would probably have had ***no*** impact on Mrs. Wahl's legal experience, but would have had a ***great*** impact on the problems faced by Mrs. Bankston.

As I understand it, if S. 1712 had been in effect, Mrs. Wahl's case might have been removed to federal court by the defendant. Mrs. Wahl achieved what she thought was a favorable result in state court, but there is no reason to believe that a similar result would not have been achieved in federal court. The Florida class action rule under which Mrs. Wahl's case was certified for class treatment is the same as the federal class action rule, and S. 1712 would not change the substantive law applicable to Mrs. Wahl's claims in any respect.

In contrast, Mrs. Bankston has been victimized because she owns one of the few businesses in a small rural county that is perceived as being "plaintiff friendly" and has become a haven for "mass action" lawsuits. As a result, she has been named in numerous lawsuits for one reason only – to keep those cases out of federal court. Under S. 1712, such pleading manipulations would no longer enable plaintiffs' lawyers to keep interstate class actions and multi-plaintiff cases in the state court of their choice. Thus, it is fair to assume that this type of abuse, and by extension, Mrs. Wahl's legal troubles, would end very quickly upon passage of this bill.

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[17] JUDICIAL BUSINESS, at 157.

SENATE COMMITTEE ON THE JUDICIARY
HEARING ON CLASS ACTION LITIGATION

Responses to Written Questions from
Senator Herb Kohl to Walter Dellinger

Question No. 1:

Professor Dellinger, one objection that we've heard repeatedly by opponents of this bill is that the federal courts will not be able to handle an influx of a large number of class action suits. Can you comment on whether that concern is justified?

Answer to Question No. 1:

I do not believe that this bill would overwhelm federal courts for two key reasons. First, opponents of S. 1712 have greatly exaggerated the federal court workload issue while ignoring the serious workload concerns that face state courts. Second, the bill's opponents have also ignored the fact that federal courts typically are equipped with better resources for dealing with class actions in an efficient manner.

Newly released data indicate that there has been a 7.2 percent decrease in the number of civil cases pending in our federal district courts nationwide since 1997.[1] And the number of new diversity jurisdiction cases filed in federal courts has decreased by more than 11 percent since 1997.[2] In contrast, civil filings in state trial courts of general jurisdiction have increased 28 percent since 1984 (versus only a four percent increase in the federal courts).[3] As a result, the average state court trial judge is assigned an average of 1,000-2,000 new cases each year.[4] In stark contrast, each federal judge was assigned an average of only 454 new cases last year.[5]

Moreover, many state courts are tribunals of general jurisdiction – they hear all sorts of cases, including divorce matters, custody disputes, name change petitions, traffic violations, small claims contract disputes, minor misdemeanors, and major felonies. Thus, when a class action is filed before those courts, it diminishes their ability to provide a broad array of very basic legal services for the local community.

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1 *See* Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 16 (2002) ("JUDICIAL BUSINESS").

2 *Id.* at 24.

3 B. Ostrom, *et al.*, EXAMINING THE WORK OF STATE COURTS 15 (Court Statistics Project 1998).

4 *Id.* at 12-13.

5 *See* Administrative Office of the U.S. Courts, 2001 FEDERAL COURT MANAGEMENT STATISTICS 167 (2002).

Critics also overlook the fact that even if both court systems were similarly burdened, federal courts could still deal with class actions more efficiently for two reasons. First, federal courts can coordinate "copy cat" or overlapping class actions. It is not uncommon to see twenty, thirty or even 100 class actions filed on the same subject matter. Sometimes, these cases are filed by competing lawyers; other times, they are filed by the same lawyers who are simply forum-shopping for the most receptive judge. When these similar, overlapping class actions are filed in state courts of different jurisdictions, there is no way to consolidate or coordinate the cases. The result is enormous waste, to say nothing of the unfairness. Defendants are forced to defend the same case in many different courts. And class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers. In contrast, if overlapping or similar class actions are filed against the same defendant in two or more different federal courts, the multidistrict litigation process (established by 28 U.S.C. § 1407) permits the transfer and consolidation of those cases to a single judge. The federal court multidistrict litigation system regularly consolidates multiple overlapping class actions in this manner, preventing the waste that occurs in state courts.

Second, federal judges generally have greater resources for dealing with huge, complex cases, like class actions. For example, federal court judges usually have two or three law clerks; state court judges often have none. And federal court judges usually can delegate aspects of their cases (*e.g.*, discovery issues) to magistrate judges or special masters; state court judges often lack such resources.

Finally, those urging workload concerns also ignore the fact that S. 1712 does not require that interstate class actions be heard in federal courts. It simply provides the option for either side to litigate in federal court if it so desires. In jurisdictions where the state courts provide a relatively level playing field, there is no reason to believe that all class actions will be moved to federal court. By the same token, under S. 1712, plaintiffs' counsel would no longer have an incentive to file large numbers of class actions in a small number of "magnet" courts. Thus, any burden posed by class actions would be more evenly distributed among the different federal and state courts.

Question No. 2:

Professor Dellinger, we've heard concerns that the legal rights of employees and shareholders of companies like Enron or WorldCom will be affected by this bill. Would you please comment on those concerns?

Answer to Question No. 2:

These concerns obviously strike a chord with many citizens, who have seen their stock values plummet and their retirement plans dwindle away over the last several months of corporate scandals. But S. 1712 would have no impact on these problems one way or another.

First, as I stated in my testimony, this is a jurisdictional bill. It does not address whether class actions may be brought, and it makes no changes in any person's rights or ability to assert claims. Thus, there is no reason to believe that it will have any effect on the fate of class actions regarding corporate responsibility. Second, most class actions against corporations that are

brought by shareholders or employees involve federal securities and retirement laws. As a result, these class actions are already subject to federal court jurisdiction. For example, a number of recent class actions against Enron and WorldCom have been brought in (or removed to) federal court. Thus, the bill would have no impact – even jurisdictional – on most of the class actions related to recent corporate reporting issues.

Question No. 3:

Some of the most onerous class action settlements are the ones where the plaintiffs receive coupons that they can only redeem with the future purchase of the defendant's goods, yet where their lawyers receive millions in fees. Do you believe that a consensus exists that doing a better job of informing the plaintiffs of their rights while, at the same time, telling the judges to take a closer look at these settlements are good ways to stop these coupon settlements?

Answer to Question No. 3:

I think that further clarity in class notices and closer scrutiny by federal judges will go a long way toward diminishing abusive coupon settlements. S. 1712 accomplishes both of these goals.

The non-cash/coupon settlement provision of the bill provides that a federal court may not approve a proposed class settlement under which class members would receive non-cash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits unless the court first conducts a hearing regarding the settlement and makes a written finding that the proposed settlement "is fair, reasonable, and adequate for class members." The bill also requires clearer class notices, so that prospective class members can better understand their opt-out rights. These provisions are basically a codification of best practices – most federal courts recognize the need for conducting hearings regarding proposed settlements and carefully scrutinize class notices. However, these provisions serve the important objective of ensuring that such proposed settlements receive a uniform, thorough review – both by the judges and the prospective class members.

The likelihood that non-cash/coupon settlements will be abused has been widely noted by academics, who have observed that such recoveries may produce "little or no meaningful benefit to individual class members" and that the discount they offer often "is no greater than what an individual plaintiff could receive for a volume purchase, or for a cash sale, or for using a particular credit card." J. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1369, 1367 (1995). Such settlements have been widely reported on and criticized in the media. See, *e.g.*, *No class - Lawsuit frenzy: Blockbuster settlements*, Cincinnati Enquirer, June 21, 2001, at B10; Carroll, *You get a coupon, He gets a fortune. Many recent class actions end with plaintiffs losing out to lawyers and the firms they sued*, Rocky Mountain News, June 16, 2001, at 6B; *But Legal Eagles Getting Fat and Fatter; Class-Action Lawsuits Get Dumb and Dumber*, The Arizona Republic, June 27, 2001, at B8; *Lawyers get clients coupons, keep money for themselves*, USA Today, March 27, 2001, at 12A. And coupon settlements are unpopular with the public: Opinion survey research indicates that half of all adults recall receiving a class action settlement notice (meaning that the actual number probably is much

higher), and that of that group, more than half did not even bother to claim their share of the settlement because the amounts offered were so trivial. Of those who did claim their recovery, more than half thought that what they received was not meaningful.

The bottom line is that non-cash/coupon settlements can be the source of class action abuse. S. 1712 offers a modest reform regarding such settlements, designed to assure that federal courts employ the "best practice" of being pro-active in assessing and determining whether non-cash/coupon settlements are fair to the unnamed class members – and helping to ensure that class members can better understand their rights to participate in, or opt-out of, such settlements.

Question No. 4:

Two panels of the Judicial Conference have concluded that there are problems with the class action process. Empirical studies by the RAND and Manhattan Institutes have demonstrated that class action cases are filed predominantly in a few magnet state courts. And, even consumer groups like Public Citizen have determined that a problem exists with class actions, even if they do not agree with our bill.

Do you believe that a consensus exists that problems exist with class actions and that changes need to be made to the rules governing them?

Answer to Question No. 4:

Without question, the state court class action problem is serious and requires congressional action.

Over the past four years, there have been seven congressional hearings and numerous studies on class action abuse. Each produced substantial evidence showing a substantial increase in the number of state court class action filings and demonstrating serious abuses in many of those cases. For example:

- A preliminary report on a major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts."[6]

- A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of state court class action filings had increased 1,315 percent – with most of these being nationwide or multi-state cases.[7]

- The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and concluded that class actions

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[6] *See* Deborah R. Hensler, *et al.*, PRELIMINARY RESULTS OF RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

[7] *Analysis: Class Action Litigation,* Class Action Watch, Spring 1999, at 3.

"were more prevalent" in certain state courts "than one would expect on the basis of population."[8]

- That same study looked at where the money goes in class action settlements. The results indicate that in state court consumer class action settlements, the class counsel frequently receive more money than all class members combined.[9] (Significantly, another study found that this phenomenon was ***not*** occurring in federal courts – "in most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins."[10])

- Last year, an article published in the HARVARD JOURNAL FOR LAW AND PUBLIC POLICY identified certain "magnet" county courts in which the number of class action filings was increasing rapidly, in one county by 1,850 percent between 1998 and 2000.[11] A recent update of that article indicates that the tidal wave is growing even more intense.[12]

In light of this overwhelming evidence, there can be little question that this is a serious problem in need of a solution. As the *Washington Post* noted recently, "[n]o portion of the American civil justice system is more of a mess than the world of class actions" and "[n]one is in more need of the policymakers' attention."[13]

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[8] Deborah H. Hensler, *et al.,* CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR COMMON GAIN 7 (1999).

[9] *Id.* at 15.

[10] Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 68-69 (1996).

[11] J.H. Beisner and J.D. Miller, *They're Making a Federal Case out of It . . . In State Court,* HARV. J. L. & PUB. POL'Y 143 (2001).

[12] J.H. Beisner and J.D. Miller, *Class Action Magnet Courts: The Allure Intensifies,* Civil Justice Report (Center for Legal Policy, July 2002).

[13] *Actions without Class,* Wash. Post, Aug. 27, 2001, at A27.

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September 10, 2002

VIA HAND DELIVERY
& ELECTRONIC TRANSMISSION
Hon. Patrick Leahy, Chairman
Hon. Orrin Hatch
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Responses to Questions from Committee Members On Class Action Litigation

Dear Senators Leahy and Hatch:

Thank you for the opportunity to testify before the Committee on the Judiciary on the important matter of class action litigation. This letter contains responses to the questions posed by Committee members in correspondence dated August 9, 2002. I have not had access to all of the research materials that would be necessary properly and fully to respond to the question posed by Senator Sessions. However, I have undertaken to obtain that information, and will provide a more complete response when I have an opportunity to review that data.

The following are my responses to the questions of the Committee:

Questions from Chairman Leahy.

Question 1: Based on your years of experience in class action litigation in state and federal courts, do you have any specific recommendations for the Committee to improve class action cases for plaintiffs and defendants?

Class Actions Concerns Raised in Comments to Proposed Rule Amendments

We have been very concerned with proposed changes to class action practice in legislation, such as that before the Committee, in proposed changes to the Federal Rules of Civil Procedure, and in the decisions of some courts. We articulated a number of these concerns in written comments to the Advisory Committee on Civil Rules on recently proposed amendments to Rule 23 of the Federal Rules, submitted on behalf of 17 civil rights, public interest and bar organizations, a copy of which I attach to these responses. In these comments, we identified several concerns with developments in class action practice that we believe should be, but are not, addressed in any rule amendments or legislation. These include:

a. **The Nullification of Congressionally-Mandated Anti-discrimination Remedies in the Class Certification Decisions of Some Courts.** The decisions of some courts, directly contrary to the intent of Congress in expanding damage remedies under civil rights laws, have denied class certification in civil rights actions because the complaint seeks those expanded damage remedies. As we state at pp. 8-9 of the comments:

> In order to ensure the effective enforcement of these civil rights laws and adhere to the intent of Congress, it is essential that Rule 23 be interpreted to accommodate civil rights class actions that include requests for compensatory and punitive damages. Experience, economics, and common sense all demonstrate that individual actions are inadequate devices by which to establish and redress systemic discrimination, let alone compensate all of its victims. Any real opportunity for most victims of patterns and practices of discrimination to prove and to recover damages, or secure other relief, is through class actions. Yet, decisions of some courts of appeals have interpreted Rule 23 (b) in a manner that would make class certification rare, if not impossible, in cases seeking these more recently-afforded damage remedies.
>
> Specifically, the decisions of some courts of appeals have interpreted the Advisory Committee Notes to the 1966 Amendment to the effect that Rule 23 (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," and interpreted the requirement of Rule 23 (b)(3) that common questions "predominate" over questions affecting individuals, in a manner that would preclude certification of almost any civil rights action that sought a damages remedy. *See Smith v. Texaco,* 263 F.3d 394 (5th Cir. 2001), *withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *modified, suggestion for reh'g denied* (Oct. 2, 1998); and, *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). In addition, some courts of appeals have interpreted the

requirement of Rule 23 (b)(3) that class treatment be "superior," in a manner that would prevent certification of civil rights class actions (as well as preclude individual actions) seeking to establish a pattern or practice of discrimination. *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 758-762 (4th Cir. 1998), *vacated on other grounds,* 527 U.S. 1031 (1999); *see also, Allison v. Citgo Petroleum Corp.*, 151 F.3d at 420-426. *But see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(2), 23 (b)(2) modified to provide opt-out notice, or bifurcated certification under 23 (b)(2) and (b)(3)); *Lemon v. Int'l. Union of Operating Engineers, Local 190, AFL-CIO,* 216 F.3d 577 (7th Cir. 2000)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(3), divided certification under 23 (b)(2) and (b)(3), or 23 (b)(2) modified to provide opt-out notice); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999)(same).

Such misguided interpretations of Rule 23 turn expanded civil rights remedies against the victims of discrimination: civil rights plaintiffs would be forced to elect between class-wide remedies for systemic discrimination, or the rights of individual class members to recover damages. These misapplications of Rule 23 (b) confound the intent of Congress, frustrate federal civil rights enforcement, and deny the benefit of the law to victims of discrimination.

Accordingly, Congress should express its concern, certainly in performing its advice and consent with respect to nominees to the federal bench and perhaps in legislation, that some courts would effectively nullify Congress' enlargement of remedies available to victims of discrimination by denying class certification where those damage remedies are sought.

b. **Protection of Unnamed Class Members.** The current state of the law regarding Rule 23 does not provide unnamed class members with effective protection from communications by counsel for the party opposing the class. As a result, unnamed class members may be approached by a defendant to release or waive their rights at issue in a pending class action, even without providing notice of the pendency of the lawsuit brought on their behalf While this problem may not necessarily be amenable to solution by Congress, it is important that Congress is aware of this want of protection from class members from overreaching conduct by defendants in class action litigation in considering various proposals to alter class action practice.

c. **Limits on Discovery in the Federal Courts.** In 1993 and 2000, amendments to the Federal Rules went into effect that introduced presumptive limits on discovery available in the federal courts, rendering them forums that are less suited to handle complex litigation–including class actions. The 1993 changes coupled discovery limits with

expansive mandatory disclosure obligations, which were narrowly sustained when reviewed by Congress. In 2000, federal rules were amended to narrow the disclosure obligation and, at the some time, to increase presumptive limits on discovery. The Lawyers' Committee and other civil rights organizations opposed the imposition of presumptive limits in the absence of broad disclosure obligations in both 1993 and 2000.[1] In our 1999 comments, we described the effect the amendments would have on the in reducing the capability of the federal courts to handle complex litigation, as compared to state courts, and the incentives these limitations would provide for defendants to seek to remove cases to federal courts in order to avoid full discovery:

> If one were to step back from the 1993 changes and the present proposals, and to consider in the abstract the qualities of a system of justice able to handle the most complex cases and those of the greatest public importance, one would not readily imagine its defining characteristics as having a presumptive limit of 25 interrogatories including subparts, a presumptive limit of ten seven-hour depositions, and prospective local-option presumptive limits on requests for admissions.
>
> These are the expected characteristics of a secondary system of justice, such as a city or county court of limited jurisdiction, intended to resolve comparatively simple cases in which not much of importance is at stake. If the goal of rules changes is to force more complicated litigation into state court, then the changes already implemented and those being proposed are well-adapted to that end.
>
> Unfortunately, under the 1993 changes and the present proposals, those defendants with nonpublic information suggesting that they are liable will have a strong incentive to remove cases to Federal court, where the plaintiffs will be deprived of the potentially stronger means of discovery available in State courts, and where the defendant will thereby have a better opportunity to "beat the rap."
>
> We urge the Committee to give serious consideration to the effect of these changes in shaping the future and the utility of the federal courts.

Despite the fact that these amendments to the federal discovery rules have made federal courts less well-adapted to complex litigation than state courts, the proposed Class Action Fairness Act would move a substantial number of state-law class actions from state courts into the federal courts. As well, the Class Action Fairness Act would not only provide defendants in possession of information suggesting their liability that is not publicly available with an incentive, but the means, to remove an entirely new class of

state-law class actions into the federal courts where the opportunities for discovery are presumptively more limited than in state courts of general jurisdiction.

In this respect, the legislation is one of a growing number of proposals, including amendments to federal discovery and class action rules that at the same time seek to deter, complicate and burden the prosecution of complex cases and class actions in the federal courts, and yet funnel increasing numbers of such cases into those courts. Our comments to the Advisory Committee on proposed Rule 23 amendments raised questions regarding the true motivation of those advancing such proposals. See Rule 23 Comments at p. 5. Individually and in combination, these proposals threaten the access to federal courts upon which the rights and liberties of our constitutional democracy depend.

We urge Congress to act to remove the limitations on federal court discovery in the 2000 federal rules amendments, to consider carefully and reject needlessly burdensome provisions of the forthcoming proposed amendments to Rule 23, and avoid changes that would channel more complex cases into those courts in the absence of measures that would restore and enhance the capability of the federal courts to handle such litigation, including the current burden of caseloads.

d. **Mandatory Pre-dispute Arbitration Agreements.** The ability of victims of discrimination to obtain relief through class actions is also threatened by the unilateral imposition of mandatory pre-dispute arbitration agreements that deny persons the opportunity to have their claims tried in a judicial forum. See Rule 23 comments at p. 7. Mandatory pre-dispute arbitration agreements are increasingly used by employers and others to deny individuals the opportunity to have meritorious claims heard in court, and will be interposed against class actions. Nor are arbitral forums designed or equipped with the procedural and jurisdictional requisites necessary for the disposition of class claims. Accordingly, Congress should pass the Preservation of Civil Rights Protection Act of 2001 in order to guarantee all persons access to the courts for determination of their claims, particularly those relating to their federally-protected civil rights.

Further, in combination with the use of mandatory arbitration agreements, the Class Action Fairness Act would profoundly effect the role and function of the federal courts. The combined result of the class action bill and enforcement of mandatory arbitration agreements would be to require the federal courts to expend greater time and effort in determining matters of state law involving corporate defendants, as individuals seeking to enforce federally-established rights are barred from the courts and are left only with the prospect of paying to have their claims heard in private arbitration. This is a perversion of the bedrock function of the federal courts in providing individuals with the opportunity to secure protection of their constitutional and federal statutory rights.

With regard to the newly-proposed amendments to Rule 23 themselves, the Committee on the Rules of Practice and Procedure (Standing Committee) has made substantial changes to the proposed amendments presented by the Advisory Committee that have addressed a number of our concerns. However, the amendments to Rule 23 that will be reported by the Standing Committee to the Judicial Conference will still include multiple new mandatory class notice requirements that will significantly increase the cost of class action litigation without corresponding benefits to class. In addition, the proposed amendments to be reported will include a number of new, mandated judicial proceedings and determinations, including court appointment of counsel in all cases – an unwarranted judicial intrusion into the attorney-client relationship and the adversary process in most federal class actions. We bring these concerns to your attention, in particular, as the proposed amendments to Rule 23, if approved by the Judicial Conference and the Supreme Court, will be presented to the Congress for review.

Concerns With the Basis for the Proposed Class Action Fairness Act.

To the extent that Congress seeks to understand the problems suggested by proponents of the Class Action Fairness Act, it should be aware of, and carefully consider the outcomes of several processes that are underway:

First, there is no empirical data to support the allegations and assertions that are offered by proponents of the bill. Indeed, contrary to these representations, the Federal Judicial Center's 1996 *Empirical Study of Class Actions in Four Federal District Courts* ("*Empirical Study*") suggests that many of the purported problems with federal class actions are not problems at all. See Rule 23 Comments at pp. 14-17.

Second, the Federal Judicial Center is currently undertaking a further study of one type of class action case – overlapping federal and state class actions – that is often referred to as a source of problems. Any legislative action with respect to these cases should await carefully compiled empirical evidence, rather than proceed on the basis of anecdotal and incomplete reports of aberrational cases.

Third, the American Bar Association has created a Task Force to consider and make recommendations on the questions presented by the Class Action Fairness Act. Although this Task Force has a membership disproportionately representative of counsel representing defendants in class actions, it is attempting to formulate recommendations on this subject. These recommendations and the avenues for resolving issues that they might suggest should be considered before any legislative action is taken.

Fourth, the Conference of Chief Justices and the National Center for State Courts are undertaking an initiative to improve the coordination of federal and state class action litigation, in order to address legitimate concerns regarding the handling of these cases.

The progress and results of these efforts should be carefully assessed, and the views and input of the state courts should be considered and respected, before any legislation to substantially alter the jurisdiction of those courts is advanced.

Finally, and perhaps most importantly, Congress should examine carefully the constitutionality of the "minimal diversity" approach taken in the Class Action Fairness Act. It is far from clear that consideration of the residence of persons who are not themselves parties to the action, i.e., absent class members, comports with the requirements of federal "diversity" jurisdiction pursuant to Article III of the Constitution. Such an examination is beyond the scope of these comments, and thorough, scholarly attention to this issue is necessary.

All of this information and analysis should be carefully considered by Congress before effecting any changes in the vital mechanism of class actions in the federal courts.

Question 2: Do you have any additions to your written or oral testimony that you want to bring to the attention of the Committee?

The testimony of my friend, Walter Dellinger, acknowledges that there is no empirical evidence of widespread problems with state court class action litigation to support the assertions of proponents of the Class Action Fairness Act. Indeed, Mr. Dellinger acknowledges – even emphasizes – that the problems with class action litigation which purportedly motivate the bill are not characteristic of all, or even most of the States' courts but, instead, are confined to no more than a few *counties*. See Written Submission of Mr. Dellinger at 4, Testimony of Mr. Dellinger at 27. Surely, federal legislation that would dramatically alter the jurisdiction of *all* federal *and* state courts is not the appropriate response to claimed problems in only several of the hundreds of county courts across the nation.

Another representation of Mr. Dellinger's bears closer scrutiny, however. To the extent that it is suggested that litigation involving corporations that do business in more than one state involves "interstate commerce," that usage must be distinguished from the constitutional concept of interstate commerce. This common usage of "interstate commerce" fails to meet the standards of the exercise of the Article I powers of Congress. Any proposal to affect the jurisdiction of the federal courts on the basis of matters affecting interstate commerce would, at a minimum, require some defining or limiting standard that is completely absent from the class action bill.

As well, Mr. Dellinger's suggestion that the "minimal diversity" approach would give effect to the intention of the Framers of the Constitution regarding the jurisdiction of the federal courts is questionable. Indeed, as suggested above, the constitutionality of

basing federal diversity jurisdiction on the residence of persons not actually parties to the litigation should carefully be examined.

Finally, Mr. Dellinger's suggestion that the judiciary favors the class action bill is seriously misleading. The resolution to which he referred in his presentation is a statement only of members of the Advisory Committee on the Civil Rules, which is not authorized to speak on behalf of the federal judiciary. Moreover, that statement is directly contradicted by the statement of the Chief Justice of the Supreme Court on behalf of the Judicial Conference of the United States opposing the legislation, and the stated opposition of the Conference of Chief Justices, the official organ of the judiciary of the States.

Question from Senator Sessions

Question 3: You cite as one reason for opposing S. 1712 the fact that the increased case load in federal courts would be unduly burdensome on federal judges. Statistics show, however, that federal judges are assigned an average of only 454 cases per year, Administrative Office of U.S. Courts, Federal Court Management Statistics 167 (2002), as compared to 1000 to 2000 cases per year for state judges. B. Ostrom, et al., Examining the Work of State Courts, at 12-13 (Court Statistics Project 1998). Please tell the Committee, if these statistics are true, how would shifting a few cases to the federal courts, where there is a diversity of the parties, be unduly burdensome on federal judges, especially with federal courts having the option of consolidation that is not available in some state courts.

This question raises two issues: the relative caseloads of federal and state courts; and the increase in the number of class actions that might be expected to be moved from the state courts to the federal courts.

The Caseload of Federal and State Courts

With respect to the question of the relative caseloads of the state and federal courts, I agree with the figure for civil cases per judge in the federal judiciary referred to in the question. Of course, that number does not take account of the substantial number of criminal filings per district court judge, a number that has increased in recent years. Nor does the raw number of cases accurately reflect the delays in the disposition of civil cases, particularly due to the precedence that must be given to the speedy disposition of criminal cases.

I do not have access to the research necessary to respond to the question of the caseload of state court judges at this time. For example, I am not aware of the scope of state judicial officers (i.e., justices of the peace, magistrates, etc.) or the range and variety of civil cases (i.e., summary offenses, small claims, etc.) that are included in the statistics cited in the question. These are important questions in determining the relative caseloads of state, as compared to federal courts. I do know from personal experience that the disposition of many state court cases, even those that present relatively substantial claims, occur without the expenditure of the time or effort of judges. For example, when in practice in Allegheny County, Pennsylvania, I served on panels of lawyers that would dispose of approximately 50-100 cases per morning on the docket of the Court of Common Pleas involving amounts in controversy of up to $20,000.00. Thus, in that Court alone, approximately 250-500 cases per week (or 12,500-25,000 per year) were disposed of without the time or attention of a judge.

A fuller response to the issue of federal court caseloads would require further examination of statistics and research than can be accomplished in the time allowed here. This is an important issue that deserves further inquiry on the part of the Committee.

Even without further statistical analysis, however, several facts are clear. First, with only approximately 950 district court judges, as compared to the 30,000 state court judges, federal judges and their time are scarce commodities. Thus, even the displacement of a modest percentage of cases from the state to the federal courts will have an enormous impact on the relatively tiny federal judiciary. As well, we know that class actions consume five times more time of federal judges than the average federal case and, therefore, that they present particular burdens on the time and attention of district court judges. See Federal Judicial Center's 1996 *Empirical Study*, at 36. It should be noted here that the disproportionate time demanded by class actions can be expected to increase significantly if the proposed amendments to Rule 23 are adopted, as they require a greater number of judicial determinations and involvement in the management and disposition of class actions than does the current rule.

The Substantial Increase in Class Actions in the Federal Courts That Would Result From the Class Action Fairness Act.

I respectfully suggest that the assumption contained in the question, that the bill would result in no more than "shifting a few cases to the federal courts," is not only incorrect, but vastly understates the effect the bill would have on the federal courts. There is no firm empirical evidence regarding the current number of class actions in the state and federal courts, or the number of class actions currently in the state courts that would be removed to the federal courts as a result of the bill. However, consideration of the best information available regarding the volume of state and federal class actions, and

a range of reasonable assumptions regarding the impact of the bill on pending state class actions, demonstrates that the bill would have the effect of transferring thousands of cases from state to federal courts.

It is not easy to determine the number of cases that would be affected by the bill. Precise statistics on the number of class actions in both the federal and state courts are not available. The Administrative Office of the Federal Courts reports that there were 4,563 class actions pending in the federal courts as of September 30, 2001,[2] and that 3,092 class actions were filed in federal courts in FY 2001,[3] although it should be noted that, according to the *Empirical Study*, this figure probably understates the actual number of class actions in the federal courts. See *Empirical Study*, at Appendix D, Footnote 364. Statistical data on the number of class actions in the state courts is generally unavailable. In light of this fact, the 2000 study *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, the Rand Institute for Civil Justice attempted to quantify the number of class actions in the state and federal courts through a variety of data sources, and concluded that 60% of class actions were in the state courts. If the approximately 4,500 class actions in federal courts represent 40% of all class actions, then the total number of class actions in state and federal courts can be estimated at approximately 11,250. The number of class actions pending in state courts could, therefore, be estimated at 6,750.

By purporting to establish federal diversity jurisdiction as to virtually any case in which any member of a class resides in a state different than the state in which a corporate defendant is incorporated, the Class Action Fairness Act would likely apply to a very substantial percentage of class actions currently in the state courts. Assuming that the bill would affect one-half of pending state court class actions, the bill would increase the number of class actions in the federal courts by 3,375 cases, or an increase of 75% in the number of federal class action cases. Assuming that the bill would affect only one-third of pending state court class actions, the bill would increase the number of class actions in the federal courts by 2,250 cases, or an increase of 50% in the number of federal class action cases. If the bill affected two-thirds of state court class actions it would produce an increase of 4,500 class actions–effectively doubling the number of federal court class actions.

The result of any of these scenarios would be to substantially burden the federal courts with an entirely new class of cases, and cases that require a disproportionately

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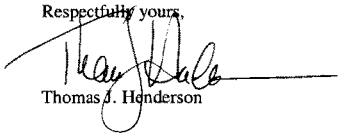
[2]See *Judicial Business of the United States Courts 2001*, Supplemental Table X-5, Class Action Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit.

[3]See *Judicial Business of the United States Courts 2001*, Supplemental Table X-4, Class Action Civil Cases Pending by Nature of Suit and District

large share of the time and attention of federal judges. This is a burden that the federal courts and current federal court litigants should not be asked to bear, and a diversion of the jurisdiction and resources of the federal judiciary from its essential role in determining and securing federally-established interests that cannot be justified.

Thank you for the opportunity to provide this further information and perspective on issues critical to federal class action litigation. If I can be of further service to the Committee or its members, please feel free to call upon me.

Respectfully yours,



Thomas J. Henderson

TJH/vms
Enclosures

SUBMISSIONS FOR THE RECORD

Patrick Baird
President and CEO
AEGON USA, Inc.
July 31, 2002

Chairman Leahy, Senator Hatch and distinguished members of the Senate Judiciary Committee, I want to commend you for holding a hearing examining S. 1712, "The Class Action Fairness Act". I also want to thank you for the opportunity to submit written testimony commenting on this critically important bill.

AEGON USA, Inc. ("AEGON") is the fourth largest life insurance organization in the U.S. I am President and CEO of AEGON USA, Inc., the U.S. holding company of the AEGON Group companies in the U.S. AEGON USA, Inc. has over $140 billion in assets and is a subsidiary of worldwide AEGON N.V. The AEGON Group companies market life and health insurance, pension and investment, reinsurance and other related financial products and services throughout the United States, and employ over 20,000 people throughout the United States.

The Problem

In appropriate circumstances, the class action mechanism is necessary, and provides an efficient means for individuals with similar causes of action against an entity to pool their resources and collective power in order to address their grievances. However, the current system is broken, and needs to be reformed. There has been a proliferation of frivolous and abusive class action suits nationwide in scope filed in various state courts. This is due in part to the fact that many state courts have less stringent class certification rules that permit frivolous class action lawsuits to proceed. In addition, the current diversity rules enable plaintiff lawyers to increase the nuisance (and therefore settlement) value of filing "copycat" class action lawsuits in 50 state courts.

In AEGON and other companies, a significant amount of money and resources are wasted each year defending abusive class action lawsuits. Funds spent on abusive lawsuits could otherwise be used to expand businesses, create jobs, develop new products, etc. Just the *threat* of an abusive lawsuit wastes the time of employees, requiring them to respond to extensive requests for document production and otherwise defend the company against these lawsuits. It is bad enough we have to defend against a single meritless suit, but to make matters worse, "copy cat" suits may be filed in different state courts without any ability to consolidate them.

AEGON and other companies are often forced to settle lawsuits that have no merit, but pose such a significant threat to the company that the only real choice is to settle. These lawsuits – filed under the guise of helping consumers – actually often result in significant financial harm to the affected companies, minimally compensate and shortchange the consumers they are designed to protect, and enrich only the attorneys who bring the suit.

Difficulty Obtaining Capital for US Expansion

The AEGON Group is an international organization, owned by AEGON N.V., a Dutch company. Although 60 percent of AEGON's worldwide business is conducted in the United States, AEGON USA must compete with its affiliates in Europe and Asia for capital from its Dutch parent. This capital is needed for expansion of AEGON's business through acquisition and new product offerings. The threat of abusive class action lawsuits in the United States drives up the cost of expansion – forcing us to borrow more than we would otherwise need to, because of the "litigation factor". In addition it makes the success of these ventures less certain. Essentially we are competing for capital against our sister companies in other countries, where the threat of abusive class action lawsuits is not an issue.

Insurance is based on the ability to anticipate risks. We have tried to anticipate our risk of being sued and price for the "litigation factor", but it cannot be done because the system is so broken. We are frequently being sued on products and business practices that are heavily regulated and, in many cases, are specifically approved by our state regulators. This added risk makes allocating capital financing to US operations less desirable than to operations in other countries where the threat of frivolous lawsuits does not exist.

Disproportionate Influence of State Courts Over Other States

The insurance industry is one of the most heavily regulated industries in the United States. Before a new insurance product can be sold it has to pass regulatory approval from the state insurance commissioner, and, depending on the type of product, the state securities regulator and the Securities Exchange Commission (SEC). But the current class action system allows a single judge in a single state to apply his or her state's law and his or her interpretation of that law to decide the rights of the plaintiffs of the other 49 states.

For example, a New Mexico court has certified class action suits against several major life insurers claiming that policyholders who were charged more for premiums paid quarterly rather than annually should have been provided an APR-type disclosure. This is despite the fact that most other states have approved the current disclosures and practice of varying premiums dependent on the mode of payment, and have filed briefs with the New Mexico court objecting to that court's interpretation and application of New Mexico law.

In effect, a single state judge can override the approval of the regulatory organizations and nullify the laws of the other 49 states.

Can we offer products the Market demands?

Unfortunately, the proliferation of abusive class action lawsuits has forced us to reevaluate whether we can offer certain products that the market demands. We are looking at exiting markets because the risk of attracting abusive class action lawsuits is too high.

The Solution

Senators Charles Grassley (R-IA) and Herb Kohl (D-WI) have championed a bipartisan bill which provides a targeted fix for the problem. The Class Action Fairness Act, S.1712, would permit large interstate lawsuits to be heard in federal court, which were designed by the constitution to hear interstate actions.

This is a common-sense fix because it would allow class action lawsuits with national implications to be heard in federal court. It would also allow similar suits to be consolidated before one judge.

The class action reform bill does not limit either the awards or trial lawyer compensation – arguably the two most controversial reform measures. Yet it fixes most of the problem. AEGON believes federal courts are far superior to state courts in these matters because of the expertise needed to deal with these complex cases and the uniformity by which they approach these lawsuits. In addition, the bill directly addresses the abuses of these lawsuits which hurt the plaintiffs in such cases, by requiring among other matters, that settlement notices be written in plain English, special scrutiny be given to the value of coupon awards and awards to in-state plaintiffs be comparable to awards to out-of-state plaintiffs.

I want to thank the Committee again for the opportunity to provide a written statement. It is my hope that the Senate Judiciary Committee and the full Senate will take up this critical piece of legislation before the end of this Congressional session.

PHILMORE B. ANDERSON
SENIOR VICE PRESIDENT, GOVERNMENT RELATIONS

KIMBERLY OLSON DORGAN
VICE PRESIDENT, FEDERAL RELATIONS

July 30, 2002

The Honorable Orrin G. Hatch
Ranking Member, Senate Committee on the Judiciary
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Ranking Member Hatch:

On behalf of the member companies of the American Council of Life Insurers (ACLI), we are encouraged by your efforts to hold a hearing on the issue of reforming class action litigation in the United States. Moreover, we strongly support S.1712, the Class Action Fairness Act, which would bring long-overdue common sense reforms and consumer protections to class action suits.

ACLI represents some 400 member companies that offer life insurance, annuities, pension, long-term care insurance, disability income insurance and other retirement and financial protection products. ACLI member companies have the majority of the life insurance, long-term care insurance, annuities in force in the United States.

The life insurance industry has experienced over a decade of abusive class actions. In one of the more recent examples of such class action abuses, State courts in New Mexico are certifying nationwide classes of plaintiffs for the manner in which their premiums are disclosed in their policies. These cases are being certified even though State Commissioners of Insurance reviewed and *approved* these policy disclosures. These class action cases have steadily weakened the very fabric of State regulation of insurance as the State judges' decisions have had national implications for insurers in other states. The result of nationwide regulation through targeted class action litigation has indirectly usurped the role and authority of the State Commissioners of Insurance.

As such, ACLI supports bipartisan legislative efforts led by Senators Grassley, Kohl, Ranking Member Hatch, Thurmond, Specter, DeWine, and McConnell on S. 1712 which would restore balance to our legal system. We hope that your Committee will hold a markup on this legislation in the near future.

Sincerely,

Philmore Anderson
Senior Vice President
Government Relations

Kimberly Olson Dorgan
Vice President
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Statement of

America's Community Bankers

on

Curbing Class Action Lawsuit Abuse

and

S. 1712, the Class Action Fairness Act

before the

Judiciary Committee

of the

U.S. Senate

on

July 31, 2002

America's Community Bankers
Washington, DC

America's Community Bankers (ACB)[1] is pleased to submit this statement for the record on legislation to help curb class action lawsuit abuses and protect consumers who are potential members of class action lawsuits. Our statement focuses on the Class Action Fairness Act, S. 1712, and an amendment we recommend that will make the Act effective for multi-state savings institutions.

ACB represents a wide range of community banks of all charter types and sizes. All of them are potential victims of class action abuse. Even if they are not themselves subject to abusive lawsuits, they are affected by adverse effects on the financial industry and on the nation's economy that result from abusive class action lawsuits. To reduce these effects, ACB strongly supports the Class Action Fairness Act.

The Act permits the removal of any truly national class action to Federal court jurisdiction even if some potential plaintiffs are from the same state as the defendant. This will help ensure that these cases are adjudicated at the Federal level when plaintiffs are from a wide range of states. This implements the original purpose of diversity jurisdiction.

In addition, the Act increases the fairness of Federal class action litigation by providing plaintiffs with important protections. For example, the Act requires judicial scrutiny of coupon and other non-cash settlement awards. Also, settlements may not require plaintiffs to make payments to class counsel unless the court finds that non-monetary benefits substantially outweigh the payments. This will help prevent abusive settlements like that perpetrated in the Bank of Boston case where account holders received modest benefits, but found their accounts docked for $91 each to pay millions in attorney's fees. Another important consumer protection requires that settlement notices be written in plain, easily understood language.

These and the other provisions of the Class Action Fairness Act are important steps that will benefit both plaintiffs and defendants alike, as well as increase the efficiency of our nation's economy.

ACB recommends that the legislation include an amendment to make this legislation effective for Federal savings associations that operate in more than one state. It amends section 4 (which provides for federal district court diversity jurisdiction over interstate class actions) and ensures that these federal savings associations, like other multi-state corporations, could be deemed to be located in a

[1] ACB represents the nation's community banks of all charter types and sizes. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

specific state for diversity purposes. (The text of the amendment is attached to this statement.)

The courts have found that a federal savings association is a citizen of the state in which it is located only if the association's business is localized in one state. In the case of federal savings associations that have interstate operations, courts have decided that they are not citizens of any state, and so there is no diversity of citizenship. The amendment we recommend would provide that for purposes of diversity jurisdiction a federal savings association is a citizen of the state in which it has its home office. The term "home office" is one that is already used in the Home Owners' Loan Act for federal savings associations.

National banks already operate under a similar rule, and so no amendment is needed in their case. Federal law specifically provides that all national banks are deemed citizens of the states in which they are located for determining the jurisdiction of a federal court. *See 28 U.S.C. 1348.* Under this provision, national banks would be able to obtain diversity jurisdiction under the class action reform legislation.

The language we are submitting today is substantially the same as a provision already approved by both the House Judiciary Committee and the House Financial Services Committee as part of the Financial Services Regulatory Relief Act.[2] We strongly urge that it be added to the Class Action Fairness Act.

In conclusion, America's Community Bankers strongly urges this committee to act favorably on S. 1712, with an amendment to clarify the home state of Federal savings associations operating in multiple states.

[2] H.R. 3951, Section 213.

Testimony of Hilda Bankston before the Judiciary Committee of the United States Senate

July 31, 2002

Thank you Mr. Chairman and Members of the Committee. I am so pleased to be here today to have an opportunity to share with you what has been a personal nightmare for me since I faced my first class action lawsuit in Mississippi.

While I have never been a plaintiff in any class action lawsuits that I know of, I do believe I have been a victim of the system since the first suit was filed against Bankston Drug Store in l999. Let me explain. My husband and I lived the American dream until three years ago when we were caught up in what has become an American legal nightmare. I was born in Guatemala and moved to the U.S. in 1958. I met my husband Mitch, a Navy seaman, while I was serving as a marine at Camp Lejeune in North Carolina. We were married there in 1964. After we left the military, Mitch attended college and pharmacy school at Ole Miss, while I worked as a seamstress. In 1971 we put down roots in Fayette, Miss., bought a local drugstore and fulfilled Mitch's lifelong dream. He worked hard and built a solid reputation as a caring, honest pharmacist. We raised two sons.

Our life was good. Then in 1999, we were named in the national class action lawsuit brought against the manufacturer of Fen-Phen. Let me stop here to explain why we were brought into this suit. While I understand that class actions are not allowed under Mississippi state law, what is permitted is the consolidation of lawsuits. These consolidations involve Mississippi plaintiffs or defendants who are included in cases along with plaintiffs from across the country. We

filled prescriptions of this FDA-approved drug for patients in Jefferson County. We kept accurate records of prescriptions dispensed – as required by law – for five years, providing the trial lawyers with a database of potential clients. By naming us, the only drugstore in Jefferson County, the lawyers could keep the case in a place known for its lawsuit-friendly environment. I'm not a lawyer, but that sure seems like a form of class action to me. It is my understanding that legislation before the Senate will cover Mississippi consolidations, like those I've been named in, as well national class actions filed in other lawyer friendly state courts.

From the moment we learned that we had been named as a defendant in the Fen-Phen case, Mitch became extremely concerned about what our customers would think. In our small town, news travels fast and reputation is everything. Within three weeks, my husband, a 58-year-old in good health, died suddenly of a massive heart attack. In the midst of my grief, I was called to testify in the first Fen-Phen trial.

Since then, Bankston Drugstore has been named as a defendant in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fen-Phen. Propulsid. Rezulin. Baycol. At times, the bookwork became so extensive that I lost track of the specific cases. And today, even though I no longer own the drugstore, I still get named as a defendant time and again.

Jefferson is a poor county, and the attorneys handling these claims have aggressively marketed their actions as the same as winning the lottery. Some days I can't open the newspaper without seeing ad after ad recruiting potential plaintiffs with a warning that "time is of the

essence" if folks want the promise of big payouts. Nor are their efforts hurt by rumors that five plaintiffs in the first Fen-Phen case split $150 million. Plus it is well-known in the community that trial lawyers point to multi-million homes that are built by successful lead plaintiffs as an inducement for signing on.

Sadly, the lawsuit frenzy has done more harm than good to our community. Businesses will not relocate to Jefferson County because of fear of litigation. And, the county's lawsuit-friendly environment has driven liability insurance rates through the roof, giving small business owners all over Fayette additional headaches they don't need. And our doctors are leaving the state in mass.

No small business should have to endure the nightmares I have experienced. Class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I've searched record after record and made copy after copy for use against me. I've had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And, I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it.

I'm not a lawyer, but to me, something is wrong with our legal system when innocent bystanders are used by lawyers seeking to strike it rich in Jefferson County or anywhere else.

In closing, I'd like to ask you to think about the victims of lawsuit abuse. My husband Mitch and I are only two of thousands throughout this country. It's not just small businesses like ours, but it's also the plaintiffs who end up with nothing or consumers who pay more for products or for insurance. We are the ones who need your help.

I urge you to pass legislation that reforms our legal system and prevents lawsuit abuses such as those that have plagued my business and my family for years. Thank you for your attention. I would be happy to answer any questions.

TESTIMONY TO THE U.S. SENATE JUDICIARY COMMITTEE

HEARING ON CLASS ACTION LITIGATION

July 31, 2002

by F. Paul Bland, Jr.[1]
Staff Attorney, Trial Lawyers for Public Justice

INTRODUCTION AND SUMMARY

I would like to thank the Chairman and the Committee for inviting me to testify.

I am a Staff Attorney at Trial Lawyers for Public Justice ("TLPJ"), the only national public interest law firm in America that both regularly prosecutes a wide range of class actions and has a special project devoted to fighting class action abuse. I am here to make three central points. First, class actions are absolutely essential to the achievement of justice in our country. Properly used, class actions can hold wrongdoers accountable for their misconduct and vindicate their victims' rights. Second, class actions can be abused. When that happens, class actions can be perverted into a tool allowing wrongdoers to escape accountability for their misconduct and eliminate their victims' rights. Third, expanding the federal courts' jurisdiction to hear class actions will increase both the frequency and severity of class action abuse.

During my legal career at TLPJ and, before that, in private practice, I have had the opportunity to see class actions in operation from two sides. On the one hand, I have represented

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[1] Much of this testimony is drawn from or informed by the writings, experience and insight of Arthur Bryant, the Executive Director of Trial Lawyers for Public Justice ("TLPJ"), and Leslie Brueckner, a Senior Staff Attorney at TLPJ.

consumers who have been cheated or victimized by serious corporate wrongdoing in a number of important class actions. On the other hand, in more than a dozen cases I have represented objectors to abusive class action settlements, where the consumers would receive little if any relief, the corporate defendants would walk away with a complete release for any wrongdoing, and the attorneys would make significant fees. I've had an opportunity to see some of the best and the worst aspects of class action practice, and from that experience I offer the following testimony.

For many millions of Americans, the only chance of obtaining justice for a variety of legal wrongs committed against them is through the class action process. If the opportunity to bring claims on a class action basis is denied or made more difficult, many corporations will effectively enjoy complete immunity from any legal accountability for most wrongs they might commit, even when it is very clear that they have broken the law. I will trace a number of illustrations of extremely serious consumer frauds and other corporate wrongdoing where a large number of individuals received justice only because they were able to use the class action device to vindicate their rights.

At the same time, like other powerful legal devices, class actions can be and sometimes are abused. Within the past decade, several corporate wrongdoers, particularly in mass torts, have recognized that class actions -- when *abused* -- can be a powerful tool for capping wrongdoers' liability and eliminating victims' rights. The results have been predictable and outrageous. Through class action abuse, companies that harmed millions have avoided accountability and deprived their victims of their day in court. Widespread wrongdoing has gone uncorrected, unpunished, and undeterred. And class actions themselves have been brought into

undeserved disrepute. The courts already have the tools, however, to stop class action abuse and I will detail some of our successful efforts to fight it.

I will also address the notion that class action abuse might be decreased or deterred if more class actions could be heard in federal court. Simply put, our experience is that abusive class action settlements are more likely to be reached and approved in courts that are busy and overburdened. And, as this Committee knows, the federal courts are already extremely busy severely overburdened. It should not be surprising, therefore, that many of the worst abusive class action settlements that we have seen have been in federal courts. Moving more class actions to federal court is likely to make the problem of class action abuse worse and harm consumers in a number of other ways.

I. BACKGROUND ON TLPJ.

Before I address the issues before the Committee, please allow me to provide some background on TLPJ. Trial Lawyers for Public Justice is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. Specializing in precedent-setting and socially significant litigation, we have a wide-ranging docket of cases designed to advance consumers' and injury victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the protection of the poor and the powerless, and the preservation and improvement of the civil justice system.

Six years ago, TLPJ became so concerned about the danger posed by class action abuse that we launched a new special project designed to protect class members' rights and the integrity of the class action device -- our Class Action Abuse Prevention Project. As I will set forth below in greater detail, we have represented objectors to at least 20 class action settlements, and our

objections have led to dramatic improvements in the relief that a number of these settlements provided to the class members. We also have special projects challenging unnecessary court secrecy, federal preemption of injury victims' claims, and mandatory arbitration abuse.

TLPJ was founded in 1982 and is currently supported by more than 2,700 members around the country. More information on TLPJ and its activities is available on our web site at www.tlpj.org.[2]

TLPJ does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, sometimes respond to informational requests from legislators and have occasionally been invited to testify to a Committee of the United States Congress on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues this Committee is considering today. We start with the most crucial point: the value of class actions.

II CLASS ACTIONS ARE ESSENTIAL TO SECURING JUSTICE FOR ALL.

Class actions are absolutely essential to the achievement of justice in the United States. In many circumstances, particularly where large numbers of people have suffered small amounts of damages or require injunctive relief, class actions are the only way that justice can be obtained. In *Deposity Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the Supreme Court explained that class actions often offer the only way that individuals with modest claims could ever obtain relief for their claims:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without

[2] In addition, many of the briefs in a number of the cases discussed below are available to the public, for free, on our website.

any effective redress unless they may employ the class-action device.

445 U.S. at 339. *See also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("Class actions serve an important function in our system of civil justice.")

TLPJ's experience demonstrates that class actions are often the only way to achieve justice for victims in cases ranging from consumer fraud to workers' rights to race and sex discrimination. Allow me to provide a few examples:

- In *Cox v. Shell Oil Co.*, No. 18,844 (Tenn.Ch.Ct. Obion County 1995), the polybutylene plumbing class action litigation, TLPJ and its co-counsel won the largest property damage class action settlement in U.S. history, with the defendants committing to spend a minimum of $950 million to repair, replace, and pay for property damage stemming from leaking pipes and fittings. By way of background, polybutylene piping had been installed in an estimated six million homes, town houses, mobile homes and other properties after 1978. There was overwhelming evidence that these pipes began to leak in a very great many of these homes, often causing extensive damage, but not enough damage that it would have been economically feasible for most of the homeowners to sue individually.

The vast majority of these homeowners would never have received justice if it were not for the class action device. A number of different corporate defendants each argued that its products were blameless, and fiercely resisted disclosing any documents or witnesses relating to the defects. It took years of work by consumer lawyers, and many thousands of dollars in expert witnesses and investigative expenses, to break through these defenses and determine what had occurred. Many thousands of consumers who have had their homes "re-plumbed," and had defective pipes replaced and repaired at no cost to them, would be left with leaking pipes and no

relief if they had not been permitted to band together and pursue this case as a class action.

- In *Ting v. AT&T,* 182 F.Supp.2d 902 (N.D.Cal. 2002), TLPJ and The Sturdevant Law Firm in San Francisco represent a class of consumers challenging the mandatory pre-dispute binding arbitration provision in AT&T's new contract with its long distance customers. While the enforcement of arbitration clauses is favored under California law, an arbitration clause will not be enforced if it is drafted in a way that makes it unconscionable under state contract law. Under California law, a contract is unconscionable if it does not permit consumers to effectively vindicate their rights under the state's consumer protection laws. The case went to trial last November, and the federal court held that AT&T's arbitration clause was unconscionable and unenforceable for 7 million California residents because the clause illegally limits the damages consumers can receive, prohibits class actions, imposes prohibitive arbitration costs, and incorporates excessive secrecy.[3]

- In the course of the *Ting* case, we investigated previous consumer class action lawsuits that had been brought against AT&T and other long distance phone carriers. We determined that a number of class action lawsuits for various overcharges and deceptive practices had been successfully brought to conclusion against AT&T and these other corporations. In one case filed in New Jersey state court, for example, AT&T had been accused of intentionally over-charging subscribers by charging per-minute usage fees in the wrong month. AT&T settled the

[3] The case is now on appeal before the U.S. Court of Appeals for the Ninth Circuit. AT&T's principal argument on the appeal is that the Federal Communications Act preempts the state consumer protection and contract statutes on which the case is based.

case, paying out 100 cents on the dollar to 83,611 consumers. 182 F. Supp.2d at 918.[4] Based on the *stipulated* testimony of the lawyers in the New Jersey case, and unrefuted testimony of a number of experts, the court in the *Ting* case held that "It would not have been economically feasible to pursue the claims in these cases on an individual basis. . . ." *Id.* With the class action device, the overcharged consumers in the New Jersey case recovered 100% of the overcharge. Without it, they would have received nothing. There was similar evidence relating to a number of other class actions in the record in the *Ting* case. Accordingly, the federal court determined that the ban on class actions in AT&T's contract would prevent millions of customers from effectively vindicating their rights.

- In *Chisolm v. TranSouth Financial Corp.*,[5] a used car dealer and a bank combined to perpetrate an egregious fraud upon consumers. The evidence established that the used car dealer frequently sold cars to low income persons who could not afford them – particularly young servicemen from the Norfolk base – at interest rates of up to 30%. As many as 50% of these cars were repossessed in some years. Instead of properly selling their repossessed cars in a public auction or by other legitimate method, the bank and the car dealer had a secret deal. The bank would "sell" the cars back to the car dealer for a nominal amount (usually $1,000 or $1,500), and use phony "bids" to create a bogus below-market "sale price" for the cars. Again

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[4] I know of a number of other cases in which consumers have recovered 100% of their losses through class actions. In *Ledesma v. Green Tree* (San Francisco Superior Court, Case No. 300007), for example, a lender was collecting certain fees that were illegal under state law. Under the settlement in the case, the defendant refunded or agreed not to collect $8.7 million in these fees, which amounted to 100% of the consumers' losses.

[5] This case produced a number of different published and unpublished opinions. The one that offers the most complete explanation of the underlying facts can be found at 184 F.R.D. 556 (E.D. Va. 1999).

and again, the car dealer then re-sold the same cars to other customers for much higher prices. The dealer sold some cars to as many as six different customers. The dealer and the bank then used the phony "bid" prices to cheat thousands of consumers by not paying them the surplus funds generated when they later sold the cars for more than the class members ever actually owed. In many cases, the dealer would actually sue the (generally unrepresented) consumers because the phony bids were below the amount of the loans, and attach their property or salaries.

The *Chisolm* case could not have been successfully brought on an individual basis. One defendant fought the litigation for eight years, using scorched-earth tactics such as refusing to answer any discovery requests, filing up to eight different briefs raising the same point on repetitive motions, attacking the consumers' counsel, and the like.[6] No individual consumer could ever have collected the resources to overcome this kind of defense. The court found "that it would be both inefficient and difficult for the 2500 putative class members with individually small claims to sue a large corporation like TranSouth in the absence of a class action. Therefore a class action is the appropriate and superior method for the fair and efficient adjudication of the controversy." 184 F.R.D. at 565.

- Class actions have also been crucial to preserving civil rights. In *Cohen v. Brown University,* for example, our precedent-setting Title IX class action lawsuit, TLPJ proved the school was guilty of sex discrimination, prevented the elimination of successful women's

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[6] At several different junctures in the lawsuit, one of the defendants was caught destroying thousands of documents. The day after the case was filed, for example, scores of garbage bags filled with documents related to the case were put in a dumpster. Only six of them were recovered. Despite a court order prohibiting the further destruction of documents, a few years later an employee of the same defendant acknowledge in a deposition that the corporation had destroyed a significant number of computerized documents.

intercollegiate athletic teams, and made new law benefitting women athletes and potential athletes nationwide. *See Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I. 1992), 991 F.2d 888 (1st Cir. 1993), 879 F.Supp. 185 (D.R.I. 1995), 101 F.3d 155 (1st Cir. 1996), *cert denied,* 520 U.S. 1186 (1997).

- Ten years ago, prior to coming to TLPJ, I had an opportunity to work (in a very junior capacity) on a team of exceptional lawyers who represented residents of a neighborhood in Denver who were victims of severe toxic pollution. The case was captioned *Escamilla v. Asarco*, and it was filed in state court in Colorado.[7] Asarco operated a cadmium smelter that put so much pollution in the air that there were significant levels of lead in the soil of the yards of many of the residents of Globeville, where our clients lived. After a six-week trial, the jury awarded our clients $28 million for the decreased value of their homes. The case was then settled for $35 million, with Asarco agreeing to remove and replace the top 12-18 inches of topsoil throughout the neighborhood (removing all of the lead and other pollutants that had been threatening the health and families of our clients) and pay $14 million in cash to the clients. There is no doubt that the case could never have been brought on an individual basis. The case involved complex proof of the pathways that the pollution took from the plant to the neighborhood, of the proper values to be placed on the properties in the neighborhood, and many other subjects. No individual could have successfully brought this major polluter to justice – it was a class action or nothing.

As these examples reflect, class actions, properly used, have been a powerful tool for holding wrongdoers accountable and vindicating victims' rights. That's why wrongdoers usually

[7] No reported opinion was ever produced in the case.

oppose their use. Accordingly, we strongly urge the Committee to be cautious in enacting any measure that might make it substantially more difficult for consumers and others to bring class actions. Not so long ago, Congress responded to claims raised about certain class actions by making it much more difficult for consumers and investors to bring securities class actions in state court, as well as to hold accountants and other professionals liable for their roles in defrauding consumers and investors. We fear that these actions may have contributed to the erosion of standards for corporate governance that led to much of the fraud that has recently harmed the economic security of so many Americans. We urge the Committee to be careful of passing legislation that might insulate some corporate defendants from being held accountable for serious wrongdoing.

III. CLASS ACTION ABUSE CAN BE PREVENTED.

While class actions provide enormous benefits to millions of Americans, class actions can be abused and, when they are, serious damage can be done. TLPJ's extensive experience shows, however, that class action abuse can be prevented.

A. TLPJ's Class Action Abuse Prevention Project

TLPJ's Class Action Abuse Prevention Project is a nationwide campaign dedicated to monitoring, exposing, and fighting class action abuse. Through the Project, TLPJ seeks to *enforce* class members' existing legal rights by objecting to illegal or unfair class action settlements; *develop* the law by winning judicial recognition of additional protection against class action abuse; *educate* lawyers, the judiciary, and the public about class action abuse and possible ways to prevent it; and *help* others to do all of the above. Among other activities, we monitor class action cases throughout the country and take legal action to challenge specific abuses on

behalf of objectors or as *amicus curiae*.

Through the Project, TLPJ has targeted and fights a number of specific abuses. While the following list is not all-inclusive, the primary abuses that concern us are:

- efforts to limit a class member's right to opt out of a class action for damages and pursue his or her own compensatory and/or punitive damages claims on an individual basis;
- attempts to use class actions to settle the "future" personal injury claims of people who are not currently injured – or, in some cases, may not yet even exist;
- "settlement-only" class actions that would and could never be litigated as class actions, but are being used to cap the defendant's liability through the class action device;
- settlements that release class members' claims in exchange for "coupons" that provide little or no meaningful relief to the class – and, in some cases, extraordinarily handsome fees for class counsel;
- unnecessary claims procedures, such as requiring credit card customers to file claims forms, instead of simply crediting their recoveries to their accounts; and
- improper secrecy provisions, including gag orders on class members or their counsel and attempts to conceal terms of a settlement or the amount of attorneys' fees.

In the past six years, TLPJ has had great success fighting these class action abuses and establishing new law to help others fight them as well. To cite just a few examples:

- In *Graham v. Security Pacific Services, Inc.*, No. 2:96-CV-132 (S.D.Miss. 1996), we won massive improvements to a proposed nationwide settlement of consumer fraud claims against BankAmerica in Mississippi federal district court. The original settlement would have paid approximately $2 million to class members, $5.4 million to class counsel, and

deprived all Mississippi class members of their right to opt out. It also would have required all class members to file claim forms to receive compensation, allowed any unclaimed funds to revert to the bank, and paid non-Mississippi class members only half as much as Mississippi class members. After we were done, the final settlement paid $7.9 million to the class, $1.92 million to class counsel, and allowed all class members to opt out. The funds were automatically distributed, no class members had to file claims forms, no money reverted to the bank, and class members from all states received the same relief.

- In *Kalhammer v. First USA Bank,* No. 95-4563 (N.Dist. Ca.), in San Francisco federal court, we defeated outrageous secrecy provisions and won huge improvements to a proposed nationwide settlement of claims that First USA cheated its credit card holders. The allegations were fairly egregious. The gist of them was that First USA promised new customers that they would be charged a low interest rate for a period of six months, then substantially raised the interest rates well before the six month period had elapsed. The consumers lost $9.12 on average, but the bank had so many customers that the total wrongful profits approached $15 million. This is precisely the kind of case that could never have been brought if the class action procedure was not available. Unfortunately, the original settlement barred public disclosure of both the total settlement amount and total attorneys' fees, and prevented class counsel and class members – but not First USA – from talking to the press about the deal. It also provided current First USA cardholders with "rebate certificates" for five dollars or less, but gave *nothing* to former cardholders. According to experts, the rebate certificates would have yielded less than $400,000 in

actual relief to the class. In response to our challenge, the settlement was amended to eliminate the secrecy, give automatic credits to the vast majority of the class, and require First USA to pay a minimum of $6 million.

- In a series of *amicus* briefs, TLPJ challenged – and ultimately helped persuade the U.S. Supreme Court to reject – the proposed class action settlements of millions of present and future asbestos victims' claims in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corporation,* 527 U.S. 815 (1999). These two Supreme Court decisions established important new procedural protections severely limiting class action abuse.
- In *Walker v. Liggett Group, Inc.,* 175 F.R.D. 226 (S.D.W.Va. 1997), and, subsequently, *Fletcher v. Brooke Group Ltd.*, CA. No. CV 97-913 (Ala.Cir.Ct. Mobile County), we ensured that tobacco victims nationwide could proceed with their claims against the Liggett cigarette company, defeating proposed no-opt-out settlements in West Virginia federal court and Alabama state court, respectively, that would have capped the company's liability and provided virtually no relief to the class. The decision in *Walker* was the first in the country to reject a proposed class settlement based on the U.S. Supreme Court's decision in *Amchem*.

B. The Causes of Class Action Abuse

The driving force behind most class action abuse is the desire of wrongdoers to cap their liability in consumer and mass tort cases. Defendants do not generally want cases to be *litigated* as class actions because they recognize that class actions, properly used, can be a powerful tool for vindicating their victims' rights. They do, however, often want cases to be inappropriately

settled as class actions because they realize that class action settlements — especially settlements that misuse the class action device — can be an equally powerful tool for limiting or even eliminating their victims' rights.

Regardless of the defendant's motives or desires, abusive class action settlements cannot take place without the cooperation of class counsel. Unfortunately, some class action counsel are far too willing to agree to a bad class settlement in exchange for a quick or hefty fee. And, regrettably, many more feel forced to agree to objectionable or inadequate settlement terms because they sincerely believe – rightly or wrongly -- that the judge will not allow them to pursue the class' legitimate claims and that any recovery for the class (and a fee) is better than nothing for the class (and no fee at all).

The most important point, in our view, is that courts hold the key to stopping class action abuse. While plaintiffs, defendants, and their attorneys all contribute to class action abuse, judges have the power to prevent it. Unfortunately, some judges do not understand how they can stop class action abuse, others do not seem interested in stopping it, and others actually take actions that encourage it. For example, some judges are extremely hesitant to certify a case as a class action for litigation purposes, while others are extremely eager to do so, without regard to whether the legal criteria for class certification are met. The former are contributing to class action abuse because they are effectively telling class counsel that, unless they reach a settlement acceptable to the defendants, the class will recover nothing -- and, since class counsel do not have a credible threat to take the case to trial, they can't force the defendant to provide much relief to the class in settlement negotiations. The latter are contributing to class action abuse because the legal criteria for class certification are designed to ensure that the absent class

members' interests are truly served by the class representative and class counsel. If the criteria are not met, the case should not be certified as a class action.

As the foregoing suggests, the single best way to stop class action abuse is for judges to take seriously their fiduciary duty to protect class members and their rights. If judges want justice to be done, they must certify cases for litigation as class actions when the legal criteria are met. The solution to class action abuse isn't eliminating class actions. That only hurts class members a different way. At the same time, judges must make sure that the class action rules and Constitution are satisfied; that any proposed settlement truly is fair, reasonable, and adequate; and that attorneys' fees are properly based on the recovery actually obtained for the class.

IV. INCREASING THE NUMBER OF CLASS ACTIONS IN FEDERAL COURT WILL INCREASE CLASS ACTION ABUSE AND HURT CONSUMERS.

A. Because Federal Courts are Extremely Busy and Overburdened, Abusive Class Action Settlements are More Likely to be Reached and Approved if the Federal Courts' Jurisdiction Over Class Actions is Expanded.

As I mentioned above, judges play the key role in defeating class action abuse. In our experience, moreover, courts with very heavy dockets and courts that are overburdened face far greater pressures to move cases quickly. And one of the easiest ways to move a case quickly is to approve a poor settlement because, even if the consumers or victims receive very little, the case goes away.

In our experience, particularly as more and more criminal cases have found their way into federal court, many federal courts around the United States have exceptionally heavy dockets. As a result, civil cases in federal court tend to move much more slowly than cases in most state

courts, despite some of the reforms that this Committee spearheaded in the early 1990s. One example from my own practice may help illustrate this point.

I am currently handling a case involving double-billing practices by an HMO in violation of Maryland state law. The case was divided into two parts by a federal district court, which held that some of the consumers' state law claims were preempted and barred by a federal statute (the Employee Retirement Income Security Act, or "ERISA"), but that the other consumers could go forward with their claims in state court. The federal part of the case was appealed, and I argued the appeal to the U.S. Court of Appeals for the Fourth Circuit in January of 1999, *more than three and a half years ago*. Our clients still do not have a ruling from that court. The state part of the case went forward to the Maryland Court of Appeals (the high court in Maryland), which issued a unanimous, lengthy decision in favor of our clients within about 30 days of the oral argument. *See Riemer v. Columbia Medical Plan*, 358 Md. 222, 747 A.2d 677 (Md. 2000). This is only one particularly egregious illustration of a phenomenon that most practicing litigators take as given in most of the country – federal courts are generally slower because of their very heavy case load.[8]

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[8] As one more illustration, I earlier described the case of *Escamilla v. Asarco*. That case proceeded through the Colorado state court system in a few years. By contrast, I was also counsel in a similar toxic tort case that was in federal court. The federal case took more than three times as many years to proceed. At one point, the federal district court dismissed the case. We appealed, successfully, and the U.S. Court of Appeals for the Tenth Circuit reinstated the case. Then, after the case was remanded, we waited over one year for the district court to schedule a hearing in the case on new motions filed by the defendant, and then more than one more year for the district court to rule on those motions. While we waited for the harried federal court to rule in the case, our clients watched the value of their homes deteriorate and their businesses collapse (some of our clients operated white water rafting concerns, for example) due to the pollution of the river. I also earlier described the *Chisolm v. TranSouth* case. That case took eight years to complete, even though it was filed in the Eastern District of Virginia's "rocket docket."

This kind of heavy caseload creates strong incentives for courts to approve settlements and move cases along. I respectfully suggest that a case in point is *Cusack v. Bank United of Texas*, a case that was filed in the Northern District of Illinois and later went to the U.S. Court of Appeals for the Seventh Circuit. I should make clear at the outset that TLPJ was counsel for objectors to this settlement, and that both the district court and the court of appeals rejected our clients' objections.

In this case, the plaintiffs alleged that, in the course of servicing its customers' residential mortgages, Bank United required homeowners to maintain "cushions" in their escrow accounts that exceeded certain contractual and statutory limits. This practice allegedly deprived homeowners of millions of dollars, in violation of the Real Estate Settlement Procedures Act, various state laws, and the class members' contracts with Bank United.

According to the lawyers for the plaintiffs, this was one of more than 70 similar cases filed against different lenders around the country, and through the multi-district litigation process more than 50 of these cases were filed in the same court, before the same federal district court judge. If each of these cases proceeded through normal litigation, with motions practice and discovery and an actual trial, it would have imposed enormous burdens upon that federal court. Instead, the cases were apparently all or nearly all resolved through extremely similar settlements.

Judging from the district court docket sheet in the *Bank United of Texas* case, there was essentially no activity in the case from March 1994, when it was filed, until September 1996, when class counsel filed a joint motion for certification of this case and at least 14 other virtually identical actions against other lenders. After the district court granted the motion and certified

the case as a class action a few months later, no further filings were made in the case until November 1997, when the parties moved for approval of a proposed settlement that would resolve all the remaining issues in the litigation.

Under the settlement, the sole relief for the consumers was a $175 "discount certificate" that could be applied only against the closing costs of a new or refinanced mortgage with Bank United. Class members who did not use their discount certificates would receive no value from the deal, and the certificates cannot be used in conjunction with any other discounts or promotions offered by Bank United. In exchange for these coupons, Bank United got a total release of all liability for all claims relating to its mortgage escrow overcharges, and class counsel got $400,000 in attorneys' fees.

For most of the class members, the only notice they ever received of the settlement was a one-time notice published in the *New York Times*. This was for a class of persons who largely lived in *Texas*. For any of these class members to get anything from the deal, they had to (a) buy a copy of the *New York Times* (something not terribly common for most Texas homeowners) on the one day when the notice appeared; (b) find and read and understand a fine-print class action notice buried deep in the paper that took up one eighth of a page; (c) refinance their mortgage or take out another mortgage with Bank United; and (d) present the notice at closing. In objecting to the settlement, our clients argued that only a tiny percentage of the class members would ever get anything out of this deal.

Despite our objections, the district court approved the settlement as fair, adequate, and reasonable, and granted class counsel's request for $400,000 in attorneys' fees. More remarkably, the federal judge – on his own motion – ordered that the redemption rates for the

discount certificates be *filed under seal*. In other words, there is a secrecy order in place that prevents the public from learning whether many consumers will ever redeem the coupons.

Our clients appealed this decision to the U.S. Court of Appeals for the Seventh Circuit. In opposition to the appeal, among other arguments, the settling parties stressed that dozens of similar suits were pending, and that breaking up this settlement would lead to enormous delays in the handling and resolution of those other cases. Ultimately the Court of Appeals approved the district court's order, and thus the entire settlement, in a very brief unpublished opinion.

This experience highlights a problem we have repeatedly witnessed: overburdened courts are more likely to approve abusive class action settlements and federal courts are already overburdened. To put it simply, expanding the jurisdiction of federal courts over class actions will make the problem of class action abuse worse, not better.

B. There Are Good and Valid Reasons Why Consumer Plaintiffs Often Prefer State Court

Much of the rhetoric that has accompanied the drive to federalize class actions has lampooned state courts as being a supposedly lower quality forum than federal courts. Corporate advocates often describe state court judges as typically unsophisticated, and more prone to doing whatever they like. My experience and practice, and that of other lawyers at TLPJ, and that of a great many consumer lawyers with whom I have spoken, indicates that this caricature is not only wrong, it is grossly unfair. Many of the generalized attacks upon state courts that I have seen are flatly at odds with the experience I have had in walking into state courtrooms around the country. Moreover, we know of no empirical evidence suggesting that abuse of class actions – much less abuse of class actions in *state courts* – has had any significant harmful effect on American

business or the U.S. economy.

Many tort reformers suggest that consumer plaintiffs prefer state court because they are looking for less sophisticated decision makers. The claim of such advocates is that corporate defendants would generally be found innocent of any wrongdoing if the judge was just intelligent enough to understand their arguments. This insinuation is not only unfair to both consumers and state courts, but also ignores the true and valid reasons why consumer plaintiffs generally prefer state courts.

First, state law remedies in many jurisdictions are greatly superior to federal consumer protection laws for a great many types of scams. As a result, many consumer plaintiffs prefer to bring claims under state laws. In many jurisdictions, our experience and the experience of practicing lawyers with whom we regularly work is that state court judges tend to be far more familiar with, and sometimes more respectful of, state statutes and state consumer protection laws.

Second, delay nearly always favors corporate defendants in civil litigation, and federal courts often tend to move more slowly than state courts. Plaintiffs bear the burden of proof in civil litigation and, if a case lingers for years, it becomes harder to meet that burden. Documents are "lost," witnesses' memories begin to fade (particularly where the witnesses are poorly educated low income persons, being asked to remember specifics of complex transactions that occurred years before), class members move and become harder to find and keep track of, etc. In addition, most experienced lawyers will agree that few defendants are likely to take any serious interest in settlement negotiations until a trial date approaches, and delays ultimately allow even plainly guilty corporations to hold onto wrongful profits (and thus have the use of that money)

for long periods of time.

Third, overburdened courts are more likely to look for ways to dispose of cases short of trial.[9] Accordingly, it should be little surprise that federal courts tend to be far more likely to dispose of cases through devices such as summary judgment than are most state courts. At one point several years ago, I was doing legal research on the application of the standard for summary judgment in one federal court of appeals before which I was appearing. I ran an extensive computer search and came up with more than 30 cases in the previous 18 months where that court had heard appeals of grants of summary judgment, and in every single case the grant of summary judgment was approved! While the court repeatedly used the standard legal phrases – cases will only be taken from the jury if there was no "significant dispute" about any "material fact" – the reality was that this court strongly favored the use of summary judgment as a means of clearing dockets and finally resolving cases. TLPJ's experience, and that of many other consumer lawyers with whom I have spoken, is that state court judges are far more likely to permit cases to go to trial.

Fourth, the United States District Courts are not convenient to the many Americans who live outside of the largest metropolitan districts. In Maryland, where I live, an attorney or witness who lives in Garrett County or in Somerset County on the Eastern Shore must drive three hours to get to the nearest federal court. And Maryland is one of our smallest states.

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[9] It is clear that at least some federal judges view civil litigation as a burden. In *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001), for example, a majority of the Supreme Court justified its holding that the Federal Arbitration Act permits employers to require employees to submit to mandatory arbitration as a condition of employment, in part, by arguing that forcing employment disputes out of court and into arbitration would relieve the "burden to the Courts." It is fair to say that a great many civil rights plaintiffs, and their lawyers, would prefer a forum that does not see their statutory claims as a "burden."

CONCLUSION

If class actions are restricted or made significantly more difficult, it is predictable that corporate wrongdoing will increase, and many fleeced consumers will have no remedy for wrongs done to them. While class action abuse is a serious problem that deserves closer attention from judges at all levels, increasing the federal courts' jurisdiction over class actions is far more likely to exacerbate the problem than to solve it.

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Protection for plaintiffs

7/31/2002

Congress has an opportunity to change a deplorable system that has enabled trial lawyers in class-action lawsuits to make tons of money while plaintiffs walk away very little or nothing.

The bill, if enacted, would prevent the kind of travesty in which trial lawyers received $9.25 million in class-action settlements with Blockbuster Inc., and plaintiffs got free movie rentals and $1 coupons.

The Class Action Fairness Act would not eliminate class-action suits - nor should it. The legislation would, however, make it easier to argue large multistate cases in federal court. Federal courts would have jurisdiction when plaintiffs and defendants live in different states and when the total claim exceeds $2 million.

The bill also would require that settlement notices sent to plaintiffs be put in plain language, mandate greater scrutiny of settlements in which plaintiffs get only coupons as relief while lawyers get the cash and prohibit settlements that result in a net loss to consumers. Incredibly, some settlements have called for plaintiffs to pay a portion of the lawyers' fees.

Class-action lawsuits are important tools in settling cases involving large numbers of people. No one argues that. And such litigation can be very expensive. But plaintiffs who seek redress in court shouldn't be left with little or nothing while their lawyers walk away with large amounts of money.

In too many instances, lawyers go after cases they know they can win, and sign up unsuspecting plaintiffs who will get little or no benefit from a court victory. In addition, some of these cases are heard in local courts, whose judgments have national ramifications. In contrast, the bill now before the Senate, which already has been approved by the House, would extend the jurisdiction of the federal courts. It also would allow for greater consolidation and for less duplication.

The proliferation of unnecessary lawsuits - one of the latest being a suit against fast-food restaurants by those who are suddenly surprised that French fries aren't health food - need to be reigned in. This bill will help do that.

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PREPARED STATEMENT OF
PROFESSOR WALTER DELLINGER

HEARING ON "CLASS ACTION LITIGATION" BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE
JULY 31, 2002

The financial scandals of recent months have eroded confidence in important public and private institutions. As Congress realized, private interests were manipulating, and some cases evading, rules intended to protect the public by ensuring openness and accountability in corporate decisionmaking. Congress acted promptly and decisively by enacting corrective legislation.

There remains another problem of accountability and openness, one that affects the institutions of government we most expect to act fairly, openly, and impartially in the public interest – the courts. The problem relates to the startling explosion in class action litigation over the past decade. I say "relates to" because, while others have identified the problem as the very existence of an increase class-action litigation, I want to emphasize a somewhat different point. The concern I have come to share arises from the evidence showing an extraordinary concentration of class action litigation in certain state courts – certain *county* courts, to be precise. The empirical and anecdotal evidence I have seen in respect to the performance of these courts in far too many cases gives me great concern that the rights of truly injured individual plaintiffs, as well as the rights of corporate defendants, have fallen victim to manipulation, and even evasion, of settled rules – rules that, no less than the financial disclosure laws, are intended to ensure openness and accountability, as well as fundamental fairness, in the judicial resolution of major disputes with nationwide consequences.

This hearing will not be the first time Congress has heard of these problems,[1] but it should be the last: I believe Congress has before it all that it needs to recognize that the Class Action Fairness Act of 2002 is a measured and appropriate response to a problem that is not going to go away in the absence of legislative action.

The principal purpose and effect of the bill is undeniably modest: it merely adjusts the rules of diversity jurisdiction so that certain large multi-party cases – those with true nationwide compass, affecting many or even all states at once – will be litigated in the federal courts rather than in the courts of just one state (or county) or another. The bill will not eliminate a single class action that satisfies the standards for basic fairness already set forth in the federal rules governing class actions. What it will do is to ensure that all nationwide class actions satisfy at least those basic standards.

It is difficult to understand any objection to the goal of bringing to the federal court cases of genuine national importance that fall clearly with the jurisdiction conferred on those courts by Article III of the Constitution.

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[1] *Class Action Lawsuits – Examining Victim Compensation and Attorneys' Fees: Hearing before the Subcomm. on Administrative Oversight and the Courts, Senate Comm. on the Judiciary,* SERIAL NO. J-105-62 (S. HRG. 105-504), 105th Cong., 1st Sess. (Oct. 30, 1997); *Mass Torts and Class Action Lawsuits: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* SERIAL NO. 141, 105th Cong., 2d Sess. (Mar. 5, 1998); *Class Action Jurisdiction Act of 1998: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, SERIAL NO. 121, 105th Cong., 2d Sess. (June 18, 1998); *Interstate Class Action Jurisdiction Act of 1999: Hearing before the House Comm. on the Judiciary,* 106th Cong, 1st Sess. (July 21, 1999); *The Class Action Fairness Act of 1999: Hearing before the Subcomm. on Administrative Oversight and the Courts,* SERIAL NO. J-106-22 (S. HRG. 106-465) 106th Cong., 1st Sess. (May 4, 1999); *The Class Action Fairness Act of 2000,* S. REP. NO. 106-420, 106th Cong., 2d Sess. (Sept. 26, 2000); *The Class Action Reform Act of 2001: Hearing before the House Comm. on the Judiciary*, SERIAL NO. 59, 107th Cong., 2d Sess. (Feb. 6, 2002); *Class Action Fairness Act of 2002,* H. REP. 107-370, 107th Cong., 2d Sess. (Mar. 12, 2002).

When the Framers drafted the Constitution, they purposely entrusted to Congress the authority to give federal courts jurisdiction over disputes among persons residing in different states, in order to avoid the possibility of state court bias in favor of local litigants and to prevent "uneven" justice from interfering with the conduct of interstate commerce. Unfortunately, over the years, statutory gaps in federal diversity jurisdiction have prevented most interstate class actions from being heard in federal court. S. 1712 would correct this anomaly, helping to restore faith in the fairness and integrity of the judicial process.

I. THE SCOPE OF THE PROBLEM: GROWING UNFAIRNESS IN CLASS ACTION LITIGATION

Class actions are not wrong in principle. To the contrary, their true purpose is noble – to vindicate the rights of large groups of individuals who sought justice for civil rights violations and other wrongs but could not achieve such justice individually. Without question, that honorable intent has been fulfilled in many cases over the years. And it has often been achieved fairly, for in the federal courts and in the courts of most states, certain important rules are followed that ensure cases will only be litigated as class actions when doing so will be fair and just both to individual plaintiffs and to defendants. These rules require that the factual and legal claims be common to every member of the class, and that there be no issue that would divide class members against one another. These rules are intended to protect "unnamed" members of the plaintiff class, by ensuring that their interests will be adequately represented – and protected – in the prosecution of the case by the named plaintiffs and their attorneys.

Such rules also protect defendants, because if a class is certified in the absence of these restrictions, a large award reflecting the alleged injuries of all the class members may be imposed upon a defendant, even though important

differences in the facts and/or law relevant to their individual cases might well have meant that many of them actually would have been entitled to no recovery at all, had their cases been tried individually.

The problem that concerns me is this: there is evidence establishing a strong trend of concentrated class action filings in recent years in just a few state-court forums. It appears to be generally understood that certain county courts will apply very lax standards in determining which cases are appropriately heard as class actions. The evidence of this trend includes:

- A preliminary report on a major empirical research project by RAND's Institute for Civil Justice ("ICJ") observed a "doubling or tripling of the number of putative class actions" that was "concentrated in the state courts."[2]
- A survey indicated that while federal court class actions had increased somewhat over the past decade, the frequency of state court class action filings had increased 1,315 percent – with most of the cases seeking to certify nationwide or multi-state classes.[3]
- The final report on the RAND/ICJ class action study confirmed the explosive growth in the number of state court class actions and concluded that class actions "were more prevalent" in certain state courts "than one would expect on the basis of population."[4]
- And an empirical research article published in the HARVARD JOURNAL FOR LAW AND PUBLIC POLICY last year identified certain "magnet" county courts that have earned "class action-friendly" reputations and are experiencing dramatic increases in class action filings. For example, in the Circuit Court of Madison County, Illinois, the number of class action filings in the county per year has increased 1850

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[2] *See* Deborah R. Hensler et al., PRELIMINARY RESULTS OF RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

[3] *Analysis: Class Action Litigation*, Class Action Watch, Spring 1999, at 3 (Figure 2), *available at* http://www.fed-soc.org/publicantions/classactionwatch/classaction1-2.pdf.

[4] Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999) at 7.

> percent over the last three years.[5] Most of these new cases are led by attorneys outside the county, and nearly all sought to certify nationwide classes in disputes that have little, if any, connection to Madison County.[6]

As I have suggested, a predictable consequence of all this is injury not just to the defendants subjected to these cases, but to the unnamed plaintiffs who are swept into the litigation with little knowledge, no participation, and inadequate representation by named plaintiffs whose rights and interest may differ significantly from their own. The risk to class members' rights when basic class action rules are ignored is especially acute if a corporate defendant succumbs to the pressure to resolve the case by agreeing to a settlement in which individual class member recoveries are small (or even non-existent) in comparison to the fees paid to the lawyers who filed the action, as has been reported in press accounts.[7] A more systematic look at where the money goes in class settlements was undertaken by the Institute for Civil Justice/RAND in a study jointly funded by the plaintiffs' and defense bar. That study indicates that in state court consumer class action settlements (*i.e.,* non-personal injury monetary relief cases), the class counsel frequently receive more money than all class members combined.[8] Significantly,

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5 *See* John H. Beisner and Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court,* 25 HARV. J. L. & PUB. POL'Y 1 (Fall 2001).

6 *Id.* at 161-64. A recent update of the research in that article indicates that this tidal wave of cases is growing more intense. *See* John H. Beisner and Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies,* Civil Justice Report (Center for Legal Policy, July 2002).

7 *See, e.g., Lawyers Win Big in Class-Action Suits: Is It Justice or Greed?,* Charleston (S.C.) Daily Mail, June 19, 2001, at 4A; Jerry Heaster, *Enough Already With Lawsuits,* Kansas City Star, July 10, 1999, at C10; *American Airlines Settles Lawsuits Over Frequent Flier Program,* Forth Worth Star-Telegram, June 22, 2000; *Toyota Buyers' Suit Yields Cash – For Lawyers,* The Commercial Appeal (Memphis), Feb. 15, 2002, at A1.

8 Deborah R. Hensler et al., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (1999).

another study found that this phenomenon was *not* occurring in federal courts – "[i]n most [class actions handled by federal courts], net monetary distributions to the class exceeded attorneys' fees by substantial margins.[9]

I do not mean to suggest by this that plaintiffs' lawyers have no legitimate interest in compensation for work done on successful case, or that all class action settlements are unfair. What I am saying is that class action filings have increased disproportionately in just a few jurisdictions for the apparent reason that those jurisdictions are less likely to enforce class-action rules that exist to ensure full representation of the interests of absent class members, whose interests all too often are not fully protected.

The question, then, is what Congress should do to control the unfairness to plaintiffs and defendants resulting from improper state-court adjudication of the important class action device.

II. THE CLASS ACTION FAIRNESS ACT: A MODEST SOLUTION TO GROWING STATE COURT CLASS ACTION UNFAIRNESS.

While the class action problem is a serious and costly one, the solution is actually quite simple. In fact, 200 years ago, the Framers of the U.S. Constitution actually foresaw – and tried to prevent – the very types of problems that are occurring in state court class actions when they authorized giving our federal courts "diversity jurisdiction" over cases that involve parties from different states (like class actions). Unfortunately, the scope of that jurisdictional authority, set forth in Article III of the U.S. Constitution, has been limited statutorily in a way

[9] Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 68-69 (1996).

that inadvertently excludes most interstate class actions from federal court – and that inadvertence is a major source of the state court class action problem. By correcting this anomaly and enabling multi-state class actions to be heard in federal courts, the Class Action Fairness Act of 2002 would stem the flow of interstate class actions into select state courts that have developed reputations as class-action friendly venues, and thereby significantly curtail the unfairness that inevitably results.

Although the Constitution generally leaves to state courts the adjudication of local questions arising under state law, it specifically extends federal jurisdiction to include one category of cases involving issues of state law – "diversity" cases, referred to in the Constitution as suits "between Citizens of different States." The Framers established the concept of federal diversity jurisdiction to ensure that local biases would not affect the outcome of disputes between in-state plaintiffs and out-of-state defendants.[10] Diversity jurisdiction was designed not only to diminish the risk of uneven justice, but also to protect the reputation of our courts: "to shore up confidence in the judicial system by preventing even the appearance of

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[10] *See Barrow S.S. Co. v. Kane,* 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts ... jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant[ ] resides."); *Pease v. Peck,* 59 U.S. (18 How.) 518, 520 (1856); *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat) 304, 307 (1816). *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles [up]on which it is founded.").

discrimination in favor of local residents."[11] The Framers reasoned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce and that allowing these cases to be heard in federal court would ensure the availability of a fair, uniform and efficient forum for adjudicating interstate commercial disputes.[12] Thus, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. As Judge John J. Parker noted "[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."[13]

So why can't interstate class actions be heard in federal court now? The problem is that in enacting the diversity jurisdiction statute, Congress did not exercise the full authority granted under Article III for diversity jurisdiction. Instead, Congress sought to limit diversity jurisdiction to cases that are large and that have real interstate implications. Thus, under 28 U.S.C. § 1332, an action is

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[11] *See* James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future,* 43 TEX L. REV. 1, 16 (1964). *See also Bank of United States v. Deveaux,* 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description, . . . the Constitution itself . . . entertains apprehensions of the subject . . . , [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states.").

[12] John P. Frank, *Historical Bases of the Federal Judicial System,* 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); Henry J. Friendly, *The Historic Bases of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

[13] John J. Parker, *The Federal Constitution and Recent Attacks Upon It,* 18 A.B.A. J. 433, 437 (1932).

subject to federal diversity jurisdiction only where the parties are "completely" diverse (*i.e.*, where no plaintiff is a citizen of the same state where any defendant is deemed to be a citizen) and where each plaintiff asserts claims that exceed a threshold amount in controversy – currently set at $75,000.

Although class actions would appear to meet these criteria because they usually involve a lot of money and parties from multiple jurisdictions, section 1332 tends to exclude class actions from federal courts, while allowing into federal courts much smaller single-plaintiff cases having few (if any) interstate ramifications. There are two reasons for this phenomenon:

- First, the diversity statute has been interpreted to require "complete" diversity, such that diversity jurisdiction is lacking whenever any single plaintiff is a citizen of the same state as any single defendant.[14] Thus, federal jurisdiction in multiple-state cases of national importance can easily be avoided by the simple expedient of including at least one named plaintiff and defendant that share a common state citizenship (*e.g.*, by adding one small local retailer as a defendant in a case that is principally targeted at an out-of-state manufacturer).[15]
- Second, courts have held that a class action satisfies the jurisdictional amount requirement only if it can be shown that every member of the

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[14] *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), the Supreme Court explicitly held that the complete diversity rule announced in *Strawbridge* is not constitutionally required.

[15] In the class action context, it is only the citizenship of the named representatives that is relevant in determining if complete diversity exists; the presence of nondiverse, unnamed class members does not defeat diversity. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Snyder v. Harris*, 394 U.S. 332, 340 (1969). This rule enables plaintiffs' counsel to defeat diversity simply by naming a nondiverse plaintiff to be a class representative.

proposed class has separate and distinct claims exceeding $75,000 – it is not enough that the entire action puts $75,000 in controversy.[16] Although some federal courts have questioned the breadth and current vitality of this rule,[17] even a liberal interpretation (which allows a case into federal court as long as at least one plaintiff's claims raise more than $75,000 in controversy) still bars most interstate class actions from federal court. Again, a class action can easily be configured to ensure that at least one class member does not satisfy the minimum amount, or by seeking $74,999 in recovery on behalf of each and every plaintiff and class member. Either way, attorneys bringing class actions can manage to stay out of federal court – and have the action tried in the state court in the county of their choosing – even though the total amount at stake in such a class action might exceed hundreds of millions of dollars and have true multistate national implications.

Thus, we are left with the strange, and in my view, indefensible situation: Federal courts have jurisdiction over a garden-variety state law claim arising out of an auto accident between a driver from one state and a driver from another state, or a slip-and-fall by a Virginia plaintiff in a Maryland convenience store – as long as

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16 *See, e.g., Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

17 A few federal appeals courts have held that in enacting 28 U.S.C. § 1367, Congress has overridden *Zahn* and that federal courts can preside over a class action as long as one plaintiff meets the amount-in-controversy minimum. *See In re Abbott Labs.*, 51 F.3d 524, 526-27 (5th Cir. 1995), *aff'd by equally divided Court*, 529 U.S. 333 (2000); *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930-34 (7th Cir. 1996). Other courts have found that section 1367 did not abrogate the holding in *Zahn* and continue to require that each potential class member independently meet the amount-in-controversy minimum. *See, e.g., Trimble v. Asarco, Inc.*, 232 F.3d 946, 959-62 (8th Cir. 2000). Because the *Abbott* decision was affirmed by an equally divided Supreme Court, *Abbott* controls only in the Fifth Circuit, and the conflict among the Circuits on this point remains.

the plaintiff alleges medical bills, lost wages and other damages amounting to $75,001. But at the same time, federal jurisdiction does not encompass large-scale, interstate class actions involving thousands of plaintiffs from multiple states, defendants from many states, the laws of several states, and hundreds of millions of dollars – cases that have obvious and significant implications for the national economy.

S. 1712 would correct this anomaly by amending the diversity statute to provide for federal jurisdiction over interstate class actions. Specifically, S. 1712 would allow federal courts to adjudicate class actions (as well as mass joinder actions with more than 100 plaintiffs) in which any of the plaintiffs (named or unnamed) or defendants come from different states. Moreover, this bill would change the amount-in-controversy threshold to allow class actions into federal court as long as the aggregate claims exceed $2 million. Significantly, however, the bill does not extend federal jurisdiction to encompass truly "*intra*-state" class actions, *i.e.*, cases in which the claims are governed primarily by the laws of the state in which the case is filed, and the majority of the plaintiffs and the primary defendants are citizens of that state. The legislation therefore allows federal courts to exercise jurisdiction over substantial interstate class actions with significant nationwide commercial implications, while retaining exclusive state court jurisdiction over more local class actions that principally involve parties from that state and application of that state's own laws.

Although S. 1712 is a modest bill, it would go a long way toward preventing the types of bias and uneven justice that are leading to class action unfairness in certain state courts. The legislation would also eliminate concerns that local prejudices are stacking the deck against out-of-state defendants in many local

courts that have become class action "magnets." As the *Washington Post* put it recently:

> This corrupt system is made possible to some degree because of how difficult it is to yank cases from state court and move them into the federal system – where judges tend to examine them more skeptically. The bill would expand the jurisdiction of the federal courts, permitting easier removal of state actions. This would allow greater uniformity around the country in considering these cases. . . . And it would mean that cases of national importance would be decided by courts that represent the nation at large. This is a modest step – as are the bill's other provisions, which attempt to curb the uglier abuses of the class action system.[18]

Critics of this bill have argued in the past that it is unconstitutional, that it will prevent truly aggrieved people from filing class actions, and that it undermines core federalism principles. These criticisms are misplaced.

The category of cases encompassed by S. 1712 clearly falls within the "judicial Power of the United States" set forth in Article III of the Constitution. As I noted earlier, the only reason that class actions are currently excluded from federal court is that the modern-day class action device did not exist back in the late eighteenth century when Congress established the basic framework for determining which cases should be permitted in the federal courts under the Article III diversity jurisdiction authority.[19] In fact, S. 1712 would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal – if not greater – force to interstate class actions. Class actions squarely implicate the Framers' concern with preserving national standards for

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[18] *Restoring Class To Class Actions*, Wash. Post, Mar. 9, 2002, at A 22.

[19] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978); *State Farm Casualty Co. v. Tashire*, 386 U.S. 523, 530-531 (1967).

regulating and protecting interstate commerce through the exercise of diversity jurisdiction. In fact, the substantial federal interest in protecting interstate commerce is an integral part of our constitutional history, as much of the impetus for calling the Constitution Convention stemmed from a general concern that the Articles of Confederation provided the federal government with too little authority to regulate interstate commerce.[20] As Chief Justice Marshall recognized early on, the Commerce Clause embodies the substantial federal interest in regulating "that commerce which concerns more States than one," as distinguished from "the exclusively internal commerce of a State," which is more properly the concern of the states alone.[21] The large-scale, interstate class actions addressed by this bill will, in every instance, involve "that commerce which concerns more States than one."[22]

In sum, if Congress were starting anew to define what kinds of cases should be included within the scope of diversity jurisdiction, interstate class actions would surely top the list, since they typically involve the largest amounts in controversy, the most people, and the most substantial interstate commerce implications. S. 1712's extension of federal courts' diversity jurisdiction to cover interstate class actions is thus entirely in keeping with the scope of the federal judicial power in Article III,[23] and also with the Framers' intent that Congress define the contours of

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[20] Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335-41 (1934).

[21] *Gibbons v. Ogden*, 9 Wheat. 1, 194 (1824).

[22] *Id.*

[23] As noted above, the Supreme Court long ago held that "complete diversity" is **not** required by Article III. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967). Moreover, although current class action law technically requires "complete" diversity, it need only be "complete" with respect to the *named* plaintiffs and defendants because it is only the named plaintiffs whose citizenship is relevant for diversity purposes in the class action context.

federal jurisdiction (within constitutional limitations) in accordance with the national interest.

S. 1712 would not hamper the filing – or litigation – of valid class actions. This legislation would not prohibit any class actions from being filed, since it does not address *whether* class actions may be brought. Indeed, it does not alter substantive law at all; it makes no changes in any person's rights or ability to assert claims. Instead, it only addresses *where* a particular type of class action should be adjudicated – namely, interstate class actions that involve plaintiffs and defendants from several states and that call for the interpretation and application of the laws of many different states. To be sure, this may mean that some class actions currently being certified in some state courts will not be heard as class actions – but only those that should not be class actions, because they do not satisfy the basic requirements of fairness and due process too often ignored in those courts.

The bill also provides affirmative protections for class members' rights when the action is filed in federal court. The bill contains a "consumer bill of rights," which seeks to help class members understand their rights and to protect consumers from unfair settlements. As to class actions in federal courts, that "bill of rights" would require:

- That written notice of proposed class settlements be provided to class members in a clearer, simpler format.

Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). In other words, "minimal" diversity – *i.e.*, diversity jurisdiction where at least one plaintiff is a citizen of a different state than the defendants, despite the presence of additional, nondiverse plaintiffs -- is, as a practical matter, well-established in class action procedure. *See Tashire*, 386 U.S. at 531 & n.7 (citing class actions as an example of minimal diversity authorized by Article III). The current bill simply modifies the class action minimal diversity rule by permitting diversity jurisdiction where *any* plaintiff, named or not, is a citizen of a different state than any defendant -- thereby preventing plaintiffs from defeating diversity through the simple artifice of naming a nondiverse plaintiff to be the class representative.

- That coupon or other non-cash settlements not be approved unless the court holds a hearing and makes a written finding that the settlement is fair, reasonable, and adequate.
- The rejection of proposed settlements that result in a net loss for the class members, unless there is a written finding that the non-monetary benefits to the class members outweigh any loss precipitated by the terms of the settlement.
- The rejection of proposed settlements that either (a) provide greater recoveries to certain class members based on residencies in closer proximity to the court or (b) provide unreasonable "bounties" to the class representatives.
- That specified federal and state officials be notified of proposed settlements and provided an opportunity to comment on the adequacy of the proposal.

S. 1712 would not undermine federalism principles. One of the most surprising criticisms that I have heard about this bill is that it would constitute an unwarranted federal intrusion into the ability of states to interpret their own substantive state laws and experiment with class action lawsuits. That line of reasoning reflects a wholly misguided understanding of federalism – what I would label "false federalism." In fact, contrary to these concerns, this legislation would *protect* the prerogative of states to determine their own laws and policies by restricting the ability of state courts to dictate the laws of other states.

Importantly, the class action legislation does not contemplate any federal displacement of state policy choices manifested in substantive law. Indeed, the proposed legislation does not touch on substantive law in any manner. Instead, the legislation would apply uniform, federal procedural requirements to a narrow, carefully defined group of lawsuits with national economic impact. Moreover, the legislation's exclusion of federal jurisdiction over "*intra*-state" cases would specifically respect and maintain a state's authority to apply its *own* laws in cases that primarily involve parties from its own state. Under the current system, many

state courts faced with interstate class actions have undertaken to dictate the substantive laws of *other* states by applying their own laws to all other states, resulting in a breach of federalism principles by fellow states (not by the federal government). And because the state court decision has binding effect everywhere by virtue of the Full Faith and Credit Clause, the other states have no way of revisiting the interpretation of their own laws. Certainly, a state does not have any cognizable, federalism-based interest in interpreting, applying, and thereby dictating the substantive law of *other* states. S. 1712 would curb this disturbing trend.

A good example of the federalism problems inherent in the current system arises out of a nationwide insurance case in Illinois that was upheld by a state appellate court in the face of objections from a host of constituencies – including Public Citizen, the Attorneys General of Massachusetts, New York, Pennsylvania, and Nevada, and the National Association of State Insurance Commissioners.[24] The specific issue in that multi-billion dollar, nationwide class action was whether auto insurers' use of "aftermarket" auto parts in repairs (as distinguished from parts made by the original manufacturer) amounts to fraudulent behavior. The Illinois court applied Illinois law to all fifty states even though state policy on the use of aftermarket parts varies widely: Some states, in fact, encourage or require insurers to use aftermarket parts in an effort to reduce insurance rates. According to an article in *The New York Times* about the case, the Illinois court's ruling "overturn[ed] insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," creating "what amounts to a national rule on

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[24] *Avery v. State Farm Mut. Auto Ins. Cos.*, 746 N.E.2d 1242 (Ill. Ct. App. 2001).

insurance."[25]

In contrast, federal courts have exhibited particular sensitivity to the variations in substantive law among the different states, in accordance with core principles of federalism.[26] Moreover, when federal courts apply state law pursuant to their diversity jurisdiction, there is no danger of a bias in favor of any particular state's laws (which is not the case when one state decides to apply its own laws to all other states). Indeed, that is the basic premise underlying diversity jurisdiction, which promotes federalism principles.[27]

Federal courts can handle the additional work entailed by expanded class action jurisdiction. Another criticism I have heard of this bill is that it would put too big a burden on federal courts. The real problem is that the current system places too large a burden on state courts. Since 1984, civil filings in state trial courts have increased by 28 percent, versus a four percent increase in federal courts.[28] And even more tellingly, state court trial judges are assigned, on average,

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[25] *See* Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, New York Times, Sept. 27, 1998, § 1, at 29.

[26] *In re Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

[27] To be sure, some state courts are recognizing this serious problem. For example, only a few weeks ago, New York's highest court declined to apply its consumer protection statute to transactions that did not occur in New York, noting that to do otherwise "would tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws." *Goshen v. The Mutual Life Ins. Co. of New York,* 2002 WL 1418408, __ N.Y. __ (N.Y. July 2, 2002). The problem is that, as exemplified by the insurance/auto parts case discussed above, New York's clearly correct conclusion will be practically nullified when other states apply **their** laws extraterritorily through nationwide or multi-state class actions, effectively forcing New York citizens to have their complaints about New York transactions adjudicated under the laws of other states.

[28] B. Ostrom, EXAMINING THE WORK OF STATE COURTS, at 15 (Court Statistics Project 1998).

upwards of 2,000 new cases every year.[29] In contrast, each federal judge was assigned an average of only 454 new cases last year.[30]

Moreover, federal courts have more resources at their disposal to adjudicate large, interstate class actions. Virtually all federal court judges have two or three law clerks on staff; state court judges typically have none. And federal court judges are usually able to delegate some aspects of their class action cases (*e.g.*, discovery issues) to magistrate judges or special masters; such personnel are usually not available to state court judges. In addition, federal courts can litigate overlapping class actions more effectively by virtue of multidistrict litigation procedures. When 25 duplicative class actions are filed in different state courts (a not atypical situation), each is separately litigated in a different court system, and the parties and the court therefore must engage in the wasteful exercise of separately handling such overlapping cases. When 25 duplicative class actions are filed in different federal courts, they are typically consolidated for pretrial proceedings in a multidistrict litigation proceeding under a federal statute that allows for such coordination.[31]

I have heard suggestions that the federal judiciary opposes S. 1712 on the ground that it would unnecessarily increase the workload of federal courts. I therefore find it noteworthy that within the past several months, two key committees of the federal Judicial Conference – the Standing Committee on Rules and Procedure and the Advisory Committee on Civil Rules – have specifically endorsed the concept of enlarging federal jurisdiction over certain class actions

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29 *Id.* at 12-13.

30 L.H. Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 16 (Administrative Office of the U.S.Courts 2002).

31 *See* 28 U.S.C. § 1407.

through "minimal diversity legislation."[32] Both committees embraced a finding that the wave of class actions in various state courts competing with each other and with class actions in federal courts

> create[s] problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage.[33]

The committees also concluded that

> [l]arge nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity litigation and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes.[34]

Conclusion

S. 1712 would substantially ameliorate present problems with unfair state-court class actions by giving federal courts jurisdiction over most interstate class actions and thereby making it harder for plaintiffs' lawyers to avoid the more rigorous scrutiny that is typically afforded to class action settlements by federal judges.

At the same time, it would comport with the intention of the Framers, who

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[32] *See* the official website of the Administrative Office of the U.S. Courts at www.uscourts.gov/rules/index.html.

[33] Memorandum of Hon. David F. Levi (United States District Judge, Eastern District of California, and Chair, Advisory Committee on Civil Rules) at 15-16 (Apr. 24, 2002).

[34] *Id.* at 16.

envisioned that large, multi-state cases would be heard in federal court. As I noted earlier in my testimony, current law has resulted in an anomaly under which federal courts have jurisdiction over "slip-and-fall" cases in which a plaintiff steps over state lines, trips in a convenience store and seeks $75,000 in damages, lost wages and medical expenses; at the same time, however, federal courts are barred from adjudicating most interstate class actions even though these cases typically involve millions of dollars and implicate more "national" issues. By ensuring that interstate class actions can be heard by federal courts, this bill would not only fulfill the intention of the Framers, but would also substantially diminish class action abuse, promote federalism principles, and allow for the more efficient resolution of duplicative class actions that are filed in different courts. At the same time, the bill would not grant federal jurisdiction for *intra*-state class actions that are genuinely matters of state concern, nor would it affect the substantive law governing a plaintiff's ability to file a class action lawsuit.

In short, S. 1712 would eliminate many of the current problems with class actions without impinging on the ability of state courts to adjudicate truly intra-state disputes or otherwise affecting the litigation of valid class actions. For these reasons, I strongly urge the Members of this Committee to support this bill.

Statement of Senator Russ Feingold
Senate Judiciary Committee Hearing on S. 1712
July 31, 2002

Mr. Chairman, I commend you for holding this hearing. I know my good friend and colleague from Wisconsin feels strongly about this bill, and I'm glad the committee is taking the time to examine it.

I have opposed the Class Action Fairness Act in the past, and I am likely to do so in the future. The main reason for my opposition is that I do not think the bill is fair, despite its title. I do not think the bill is fair to citizens who are injured by corporate wrongdoers and are entitled to prompt and fair resolution of their claims in a court of law. I do not think it is fair to our state courts, which are treated by this bill as if they be cannot be trusted to issue fair judgements in cases brought before them. I do not think it is fair to state legislatures, which are entitled to have the laws they pass to protect their citizens interpreted and applied by their own courts.

Make no mistake, by loosening the requirements for federal diversity jurisdiction over class actions, S. 1712 will result in nearly all class actions being removed to federal court. This is a radical change in our federal system of justice. We have 50 states in this country, Mr. Chairman, with their own laws and courts. State courts are an integral part of our system of justice. They have worked well for our entire history. It is hard to imagine why this committee, which includes many ardent defenders of federalism and the prerogatives of state courts and state lawmakers, would support this wholesale stripping of jurisdiction from the states over class actions. In my opinion, the need for such a radical step has not been demonstrated.

Yes, there are abuses in some class actions suits. Some of the most disturbing involve class action settlements that offer only discount coupons to the members of the class and big payoffs to the plaintiffs' lawyers. Incidentally, these types of settlements are also favored by corporate wrongdoers, since they cost much less than providing real damages. I am pleased to see that the sponsors of the bill in this Congress have made an effort to address some class action abuses specifically, rather than just assume that they will go away if the bills are removed to federal court. I believe that if we are serious about addressing coupon settlements and other abuses, there are more efficient ways to accomplish that goal. But the fact remains that abuses have occurred in federal as well as state class actions. This bill is therefore more about federalizing class actions than about reducing class action abuse.

Mr. Chairman, class actions are an extremely important tool in our justice system. They allow plaintiffs with very small claims to band together to seek redress. Lawsuits are expensive, so without the opportunity to pursue a class action, a single plaintiff in many cases simply cannot afford his or her day in court. But with a class action, justice can be done and compensation can be obtained.

There are three possible outcomes of this bill's going into effect. Either the state courts will be deluged with individual claims, since class actions can no longer be maintained there, or there will be a huge increase in the workload of the federal courts, or many injured people will never get redress for their injuries. I don't believe any of these three choices are acceptable.

Particularly troubling is the increase in the workload of the federal courts. These courts are already overloaded. This Committee has unfortunately led the way in bringing more and more litigation to the federal courts, particularly criminal cases. And yet there is a shortage of federal judges, as our friends on the Republican side constantly complain. Criminal cases, of course, take precedence in the federal courts because of the Speedy Trial Act. So the net result of removing virtually all class actions to federal court will be to delay those cases. There is an old saying with which I'm sure we're all familiar: Justice delayed is justice denied. I fear that this bill will make that aphorism a reality for too many victims of corporate misbehavior.

Some in the business community have expressed concern about nationwide class actions, like some of the tobacco litigation, being resolved in a single state court. I can understand why that might seem unfair to some. But this bill doesn't just address that situation. It also prevents a group of plaintiffs who are all from the same state from pursuing a class action in their own state if the primary defendant is incorporated in another state. That doesn't seem right to me, particularly because corporations subject themselves to the laws of a state and its courts when they conduct business in that state. We are long past the point in our history when it can be plausibly argued that litigants cannot get a fair shake in another state's court.

Mr. Chairman, I look forward to learning more about this year's version of the "Class Action Fairness Act." But unless I decide that it is truly fair to consumers as well as corporate defendants, I will not support it. Again, I commend you for holding this hearing to help us make this determination.

Thank you.

Chuck Grassley

Statement of Senator Grassley for Judiciary Committee Hearing on Class Actions, July 31, 2002

Mr. Chairman, I'm glad that you've scheduled this hearing to look at the problems that we've seen with class actions. As you know, Senator Kohl, Senator Hatch and I introduced S. 1712, the "Class Action Fairness Act" in November of this past year, so we could do something about the rampant class action abuses we're currently seeing in our court system. I'm hoping that we'll have the opportunity today discuss how our bill can be helpful in addressing these abuses.

Let me discuss some of the problems and the need for reform. Class action lawsuits have been an important mechanism in our legal system. They bring representation to the unrepresented by allowing large numbers of plaintiffs with similar small claims to join

together and bring about an efficient resolution. Yet, the class action system has degenerated to the point where it is greatly awash with abuses.

First, class action filings have gone hay-wire. A couple of Federalist Society surveys indicated that the number of state court class actions pending against surveyed companies increased tremendously since the mid 1980s - by 1,042% over the ten year period 1988-1998. Even the Federal Judicial Conference's Advisory Committee on Civil Rules has indicated a dramatic increase in class action filings - according to the Committee Chairman Judge Niemeyer, they had received data showing that representative corporations were facing a 300 to 1,000% increase in the number of actions filed against them.

Moreover, an increasing number of class action lawsuits are being filed to the benefit of attorneys who agree to settlements which allow them to reap huge attorneys fees, while the settlements recover little or nothing of value for their clients. In hearings that I conducted in the Judiciary Subcommittee on Administrative Oversight and the Courts, we heard about settlements where class members received coupons of little worth or nothing at all, while lawyers received millions of dollars in attorneys' fees. A 1999 Rand Report confirmed that state courts often give most of class action settlements to the attorneys and not to the class members they represent. A study by the Manhatten Institute confirmed that there were numerous problems with class actions brought in state court.

Lawyers often manipulate the rules to keep class actions in state courts that are quick to certify a class without careful consideration of the required criteria. These state courts are also more likely to rubber-stamp settlement proposals without scrutinizing them for fairness. For example, in some cases, members of a class who lived closer to the courthouse in which the settlement was filed received a larger recovery than others. In other settlements, a bounty was paid to class representatives that was disproportionately larger than that provided to absent class members.

The current rules make it easy for lawyers to forum-shop and keep class action cases in state courts that play fast and loose with class action lawsuit requirements. Lawyers name irrelevant parties to

destroy diversity jurisdiction and keep cases in state court. They low-ball the jurisdictional amount to keep defendants from transferring cases to federal court, only to change that amount a year later when removal to the federal courts is barred. Similar class actions are filed in state courts across the nation, but they cannot be consolidated. These scenarios produce collusive settlements or a "race to settlement" by the attorneys. These scenarios produce unfair results when it turns out that individuals in the class have different interests, yet they are lumped up in a class and certified. I think that a class which is certified when the rules are not carefully followed results in a due process problem for consumers. Moreover, these scenarios create significant inefficiencies and waste court resources.

The most troublesome problem resulting from the current class action system is that state courts are making decisions for the entire country. Class actions are usually the cases that involve the largest amount of people, the most money, and the most interstate commerce issues. But the present system produces aberrant results as to what can or cannot proceed in federal court. An example that I've frequently cited, a slip and fall case worth $75,001 involving two residents from different states, that case can be heard in federal court. But a nationwide class action that involves thousands of people residing in all 50 states, that seeks billions of dollars in damages, that implicates the laws of every state, and that involves interstate commerce issues, that case is confined to the state courts. That doesn't make sense. Why should a

state court decide this kind of case? By allowing only state courts to hear nationwide class action suits, state courts can dictate national policy or improperly impose a specific state's law on the citizens of other states. It's clear to me that cases like these belong in federal court. That's why Senator Kohl, Senator Hatch and I joined forces and introduced the Class Action Fairness Act.

Senator Kohl and I've worked together on this issue for a long time - since the 105th Congress. In the last Congress, we were able to move our bill favorably through the Judiciary Committee, but unfortunately it was not considered by the full Senate. In the 107th Congress, we introduced S. 1712, which is the same bill that came out of the Judiciary Committee in the last Congress with a few new provisions that better protect class members.

Let me briefly speak about some of the provisions in S. 1712. The Class Action Fairness Act of 2001 provides that notification of proposed settlements must be given to the state Attorneys General or the primary regulatory or licensing agency where class members reside. The bill requires that notice to class members contain a "plain English" explanation of rights and settlement terms, including attorneys' fees.

It requires the Judicial Conference to study attorneys' fees in class actions and report on how judges can better ensure fairness in class action settlements. As you know, coupon settlements and the attorneys' fees need to be better scrutinized before they are approved.

S. 1712 would prohibit the payment of bounties to class representatives that are disproportionately larger

than that provided to absent class members. It prohibits courts from approving settlements that award some class members a larger recovery than others based on geography. The bill includes provisions to protect class members against net losses and unfair coupon or non-cash settlements.

Finally, S. 1712 loosens diversity and removal requirements so class action cases with national ramifications can be heard in federal court, and so similar and overlapping class action cases can be consolidated.

So I'm glad that we're having this hearing today. I think everyone would agree that there are problems with the current class action system that need to be addressed. We have a good opportunity to once again

bring to the forefront the serious problems rampant in the current class action system and the need for reform in this area. Judiciary Committee members need to see how important it is for us to implement reform in this area. Once we have our hearing, I'll work with my colleagues to move S. 1712 forward as expeditiously as possible. I'm committed to doing that. Class action reform and this bill are a top priority for me.

Lawyers' Committee for Civil Rights Under Law

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TESTIMONY OF THOMAS J. HENDERSON, CHIEF COUNSEL, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, HEARING ON CLASS ACTION LITIGATION AND THE CLASS ACTION FAIRNESS ACT OF 2001.

JULY 31, 2002

Good morning, I am Thomas J. Henderson, Chief Counsel of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). The Lawyers' Committee for Civil Rights Under Law is a 39 year old nonpartisan, nonprofit civil rights legal organization. It was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination.

I would like to thank Chairman Leahy and the members of the Committee for holding these important hearings on the Class Action Fairness Act of 2001 and, in particular, for providing the Lawyers' Committee with the ability offer members of the Committee on the Judiciary with evidence of the significant negative impact this legislation will have on critical civil rights litigation. We appreciate the opportunity to present the Committee with our analysis of the implications that this legislation will have on the Lawyers' Committee, our independent local affiliates, and our clients across the country.

The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. As such, through both litigation and public policy the Lawyers' Committee has been actively engaged in efforts to combat racial discrimination and segregation throughout out nation. However, the primary work of the Lawyers' Committee has always centered on using the rule of law through the state and federal judicial systems to secure redress for clients who have faced racial discrimination. Our major objective is to use the skills and resources of the private bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity. The Lawyers' Committee pursues this goal by bringing class action and impact litigation in five major civil rights areas: voting, employment, education, housing and environmental justice. It is through our role as civil rights litigators that we express our concerns about the Class Action Fairness Act of 2001 and the devastating impact it will have on the civil rights litigation that the Lawyers' Committee has been engaging for nearly four decades.

I. INTRODUCTION

Class actions have proven to be an essential tool for civil rights enforcement efforts in the experience of the Lawyers' Committee. Historically, Lawyers' Committee cases have been class actions brought in federal court seeking injunctive and, in some cases, equitable monetary relief under Federal Rule of Civil Procedure 23 (b)(2) to vindicate rights under the United States Constitution or federal civil rights statutes. In recent years, however, with Congress' recognition that effective enforcement of the nation's civil rights laws required more complete remedies, including compensatory and, in appropriate cases, punitive damages, Lawyers' Committee class actions have increasingly included actions that seek compensatory and punitive damages under Rule 23 (b)(3), as well as equitable relief under Rule 23 (b)(2).

Class actions are essential to the enforcement of the nation's civil rights laws. They are a vitally important and are often the *only* means by which persons can challenge and obtain relief from systemic discrimination. Indeed, Rule 23 (b)(2) was designed, in part, to accommodate, and has served as a primary vehicle for, civil rights litigation seeking broad equitable relief.

Our concern over this legislation and other efforts to profoundly impact federal class action rules has been ongoing. Beginning with the introduction of the Class Action Fairness Act in the 106th Congress, the Lawyers' Committee has been actively engaged in educating the Congress about the harmful effects this legislation will have on critical class action lawsuits, especially its impact on our civil rights litigation efforts. During the 106th Congress, we sent letters to both this Committee and the House Judiciary Committee, each of which were considering similar legislation, offering substantial analysis of the legislation's impact from a civil rights perspective and opposing the legislation. Further, in February of this year we submitted extensive comments to the Advisory Committee on the Civil Rules, on behalf of 18 civil rights, public interest, and bar organizations regarding proposed amendments to Rule 23, the Rule of Federal Civil Procedure governing class actions. Additionally, in its efforts to ensure continued access to the judicial process on behalf of classes of persons who suffer discrimination and inequality the Lawyers' Commitee has commented on proposed amendments to rules of procedure that will enhance or diminish access to the courts for clients bringing meritorious civil rights claims.[1]

The mission of the Lawyers' Committee does not involve state tort, contract or consumer law and, as a general rule, we do not bring state law tort, contract or consumer cases. It would have been easy for us to view this legislation as concerning only litigation in those areas and, thus, irrelevant to our work. We could have simply remained a bystander in what might appear to be another monumental dispute about tort reform. But this legislation is not about state tort, contract or consumer law. Rather it concerns the role and availability of the courts and of class actions, and of

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[1] *See* February 1, 1999, Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Amendments to Rules 5, 26, 30, and 34; Supplement to the February 1, 1999 Comments of the Lawyers' Committee for Civil Rights Under Law; December 1990 Comments of the Lawyers' Committee for Civil Rights Under Law on Proposed Revisions to Rule 11.

access to justice for those who have no alternative but to rely on the courts for the protection of their rights and freedoms.

It is our belief that the proposals referred to as the Class Action Fairness Act of 2001, S. 1712 and H.R. 2341, are unjustified and unjustifiable attempts by Congress to impose federal judicial regulation on matters of law committed to the States under our Constitution. The determination of state law tort, contract and consumer cases is not the responsibility of the federal judiciary under the Constitution. The imposition of such substantial new responsibilities on the federal courts will further impair the ability of those courts to carry out the essential functions they are to serve under the Constitution – the determination of matters involving federal interests, rights and responsibilities. Similarly, compressing virtually all class actions into the federal courts, imposing federal standards on nearly all class actions and other forms of aggregating claims, and adding new procedural requirements, as this legislation would allow, will further erode the availability of class actions and increase the burdens and delays in their use. Accordingly, this legislation will serve to deny to those who are without substantial financial means or political power the access to justice that class actions have so critically provided.

The epic reallocation of judicial responsibility proposed in this legislation is opposed by both the federal and state judiciary, and its constitutionality is doubtful. More critically, the legislation would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation.

II. How the Class Action Fairness Act Changes the Law

It is important to be clear on what the legislation would change in class action practice. For example, it has been a subject of debate whether the legislation would "federalize" class actions and what that means. It is clear that the legislation would make very substantial changes, first with respect to state law class actions that are now litigated in state, rather than federal, courts and, second, in the procedures to be applied in federal court class actions.

More specifically, as to the first of these categories, the legislation would largely eliminate from the state courts class actions brought only under state law and under state law procedures, that is, cases in which no federal question is raised. It would do so in several ways. First, the legislation would impose federal court jurisdiction in such cases and provide for the removal of these cases from state to federal courts. This aspect of the legislation not only creates an entirely new and substantial class of cases subject to federal jurisdiction, but also provides to defendants, or a single disaffected class member or class member willing to collaborate with defendants, the ability to determine the choice of forum in which a case will be heard.

Second, the legislation would effectively eliminate state law class action and claim aggregation vehicles and impose federal class action standards – now and whatever they may be in the future – on cases involving only state law claims. Simply stated, state class action rules and mechanisms would no longer apply, cases dealing exclusively with state law claims would be subject to federal class action rules. The Class Action Fairness Act does this by providing for removal into federal court and requiring the dismissal of any actions that do not satisfy the prerequisites of Rule 23 of the Federal Rules of Civil Procedure (1332 (d) (6)), despite the fact that they raise only state law issues. The ability to remove and dismiss cases that do not conform to Rule 23 effectively eliminates state law class action, claim aggregation and public interest litigation devices, at least at the choice of defendants. This is a breathtaking intrusion of federal regulation into the province of the States and on the litigation of state law claims. State class action, claim aggregation and public interest litigation devices must, of course, comply with constitutional requirements. However, displacing these methods and eliminating the ability to develop the means for resolving state law claims other than as provided in Federal Rule 23 goes far beyond ensuring the due process that is already constitutionally required.

The impact of this legislation on federal class actions is profound. Itwould impose new, burdensome and unnecessary requirements on litigants and the federal courts. Both the Senate and House bills would impose difficult and costly notice requirements that will further complicate and delay the disposition of class actions. Specifically, proposed Section 1717 would require notice to federal and state officials based on determinations of primary regulatory responsibility and the residence of all class members. These additional and substantial notice requirements and built-in delays are not a matter of due process, but are overly burdensome and improperly assume that federal and state officials have both an interest in, and a capacity to respond to, each and every state law class action on the part of federal and state officials.

The legislation creates additional problems. For example, the prohibition on approving settlements that involve named plaintiffs receiving amounts different from other members of the class is not a reasonable or practical limitation in all instances. In many employment discrimination cases there are fewer employment opportunities denied because of discrimination than there are qualified potential claimants. In those situations, a person who sues as an individual can receive a full award of back pay and in a proper case can obtain an order placing him or her in the job denied because of discrimination. A class member in such a situation must share in the total back pay award, and has only an opportunity to be one of the persons selected for hire or promotion because not all can be selected. If the price of trying to protect others is that he or she must also lose the full measure of individual relief and take only the same percentage share as those who never took any action to challenge the employer, individuals would be deterred from becoming a class representative. Thus, rather than a reform, this provision would hinder civil rights class actions.

The legislation passed in the House would go further in imposing new procedures and requirements in all federal class actions that are not justified, would effectively foreclose certain cases, including many civil rights cases, and would build-in further needless delay and expense in the disposition of federal class actions. The House bill would contradict established federal

procedure by requiring fact pleading as to all claims as to which the defendant's state of mind is an element (Sec. 1716), would provide appellate review of interlocutory class certification orders (Sec. 1292(a)(4)), and would require stays of proceedings in connection with both motions to dismiss and certification appeals.

The fact pleading requirement would have the effect of requiring dismissal of meritorious claims, particularly civil rights claims and claims to enforce constitutional protections where an intent to discriminate is a required element. Many civil rights class actions would fall victim to this requirement. The Federal Rules have long established a notice pleading standard in recognition that the facts of a case are often not available to a plaintiff at the outset of litigation, and can be uncovered only through discovery. This is particularly true of many civil rights cases, in which virtually all of the facts of the case – particularly those which would bear on the defendant's subjective intent – are in the control of the defendant. The requirement that a complaint plead specific facts or be dismissed, while discovery is stayed so that the plaintiffs cannot gain access to the facts needed to establish their case, will combine to impose an insurmountable hurdle for civil rights plaintiffs. The result will be that their complaints will be dismissed.

In addition, imposition of mandatory appeals of class certification orders, rather than the discretionary appeals now available under Rule 23 (f), is both unnecessary and will build-in to class litigation literally years of delay in the disposition of cases. There is no legitimate interest in requiring appellate review of all interlocutory class certification orders and imposing a stay on all proceedings while they are determined, particularly where all agree that the disposition of class action litigation often already takes too long.

To the extent that the legislation seeks to add protections for plaintiff class members, they are minimal and unnecessary. It does not alter the process of, or standards for, the settlement of class actions, other than indicated above, and the matters with which it is concerned have been more than sufficiently addressed in proposed amendments to Rule 23 adopted in May by the Committee on the Rules of Practice and Procedure of the United States Judicial Conference. Specifically, the proposed amendments will require a number of burdensome new notices, hearings, procedures and judicial determinations, that will themselves add new and substantial burdens, delay and expense in federal class action practice. In short, the provisions of the legislation that purport to benefit plaintiff class members are too small and transparent a fig leaf to mask the great disservice this legislation would work for those who need resort to the class action – in federal or state court – to vindicate their rights and interests.

III. The Lack of Justification for the Class Action Fairness Act

In entertaining a suggestion that Congress so fundamentally restructure the allocation of responsibility between the state and federal judiciary in our dual system of courts, it is important to understand and examine the basis offered for such a change. The literature of proponents and supporters of the legislation suggest that it is to rid corporations of frivolous lawsuits, eliminate state court bias against corporations incorporated in a different state, and to place these cases of "national

importance" in federal courts where they belong.

The suggestion that state courts are biased against corporations from other states such that they will entertain and sustain frivolous cases, is used as a justification for a drastic alteration in the meaning of diversity jurisdiction. This, in turn, depends upon a perception of corporations by state courts as "foreign" in states where they do business, simply because they are incorporated in another state. But we all know that the state of incorporation often has little or nothing to do with the actual location of a corporation's offices, plants and business operations, and of its contacts with a state as a business entity, contractor, employer, licensee and corporate citizen. The state of incorporation is an artificial factor that does not give rise to bias of the type to be addressed through diversity jurisdiction.

More importantly, the suggestions of state court bias against corporations offered in support of this legislation involve an unparalleled deprecation of state judicial systems that lack any empirical basis. In the area of civil rights, a concern that state courts might not fairly apply the law is premised on historical fact, more than a century of national experience after the Reconstruction Amendments, and countless state laws and procedures designed to preclude African Americans and others from the courts and other functions of government. Yet there is a presumption that state courts are competent to determine even federal civil rights claims. No such historical or factual basis supports the extreme and careless allegations of state court bias against corporations made in support of this bill, and not for the proposition that state courts should not be trusted to decide federal claims, but that state courts cannot be trusted fairly to decide claims under their own state laws. Frankly, as an attorney who has argued that in some circumstances state courts cannot be trusted to fairly determine federal rights, I have been shocked by the self-serving rhetoric and anecdotes put forward as though they represent a substantial factual basis for this legislation. Those allegations trivialize and demean our state courts, our federal system and the crucial role that federal courts must be available to serve in protecting the interests secured by the Constitution and federal law.

As an alternative to a diversity jurisdiction rationale, proponents would elevate state tort, contract and consumer cases to ones of "national importance" because large corporations doing business in a number of states are involved. But this characterization of such cases as of "national importance" cannot substitute for a proper basis for federal jurisdiction. Such a characterization does not correspond to provisions of the Constitution regarding the proper allocation of judicial power between the state and federal courts. "National importance" is not synonymous with "federal question." For example, these cases do not involve matters on which Congress has chosen to exercise its powers under the Commerce Clause and which, therefore, involve interests subject to federal regulation. Rather, the legal issues involve questions of state law among private parties. The Lawyers' Committee is an ardent defender and proponent of the power of Congress and the exercise of that power in furtherance of national interests. We have urged Congress to act to protect constitutional and federal interests through legislation, and have raised our voice in the courts to defend the exercise of that power in challenges to legislation. However, there is nothing about a state law class action against a corporate defendant that makes it an appropriate case in which to confer federal jurisdiction, and Congress should confine the jurisdiction of the federal courts to

matters in which there is a proper federal interest.

IV. THE EFFECTS OF THE CLASS ACTION FAIRNESS ACT.

The consequences of such legislation for class action practice in the federal courts would be astounding and, in our view, disastrous. Redirecting state law class actions to the federal courts will choke federal court dockets and delay or foreclose the timely and effective determination of cases already properly before the federal courts, in addition to the newly redirected cases. In addition, this legislation is one of a number of measures that would make federal class action litigation more difficult, burdensome and expensive, the result of which would make class actions less available to, and effective for, those whose rights cannot otherwise be protected.

First, this legislation would substantially expand the caseload of the federal courts to include hundreds, if not thousands, of complex cases that do not involve questions of federal law. It is well established that the dockets of federal courts are already significantly overburdened. It is important to point out that the federal courts have less than 1,500 judges, bankruptcy judges and magistrate judges, compared to more than 30,000 judges currently serving on state courts. Imposing substantial numbers of new cases on the overburdened dockets of the relatively modest number of federal courts will clog those dockets with the consequence that it will be more difficult to have any and all cases decided.

Currently, there are approximately 4,500 class actions in the federal courts. Although there is not uniform record keeping that would tells us the number of state court class actions, it is reasonable to assume that there are a very substantial number that would be displaced by this legislation. Even a relatively modest increase in the number of class actions in the federal courts – and there is no reason to suppose that the increase would be modest – would substantially increase the volume of work required by judges to dispose of cases.

The increased caseload is not the only burdern, this legislation would also increase the number of complex and time-consuming cases that those courts must decide. Class actions take a greater share of the time of district judges than do other forms of litigation. In fact, empirical studies have shown that class actions on average consume almost five times more judicial time than the typical civil case.[2] Thus, the stress on the federal courts and the demands on the time of judges would exceed the mere increase in the number of cases on the docket.

The effect would be to make judges less able to devote time to both existing cases before the federal courts and those that would be redirected by this legislation. All commentators on the subject agree that the most effective means of addressing the particular demands of, and problems that arise in, class action litigation is more careful judicial supervision of such cases. By unrealistically increasing the demands on federal judges, this legislation would have precisely the opposite effect.

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[2] Wilging et al., "Empirical Study of Class Actions in Four Federal District Courts". Federal Judicial Center, 1996.

Judges will have less time and opportunity to give careful supervision to critical class action litigation.

Indeed, faced with overburdened dockets, it can be expected that judges will engage in a form of triage to clear the docket by closing cases. This would lead to an exacerbation in the pressure improperly to dispose of cases by dismissal. This is a problem that particularly effects civil rights cases, and in many districts it is already difficult for civil rights plaintiffs with meritorious cases to survive pre-trial motions in order to have the opportunity to go forward to trial on the facts of the case. The unjustified dismissal of cases is a trend in the federal courts that the Supreme Court has consistently sought to correct. See *Swierkiewicz v. Sorema,* 534 U.S. 506 (2002), and *Reeves v Sanderson Plumbing Products*, 530 U.S. 133 (2000). An increase in the number of cases federal courts are to handle will only rachet up the pressure on district judges to dispose of as many cases as possible at the earliest stage of the litigation.

Moreover increased numbers of cases on federal court dockets and further procedural hurdles will exacerbate the difficulty in securing certification of class actions in proper civil rights cases. In the late 1980's and early 1990's, Congress determined that effective enforcement of the nation's civil rights laws required that the victims of discrimination have available more expansive remedies, including compensatory and, in appropriate cases, punitive damages.[3] In order to ensure the effective enforcement of these civil rights laws and fulfill the intent of Congress, it is essential that class actions accommodate civil rights class actions that request compensatory and punitive damages. The only real opportunity for most victims of pattern and practice discrimination to prove and recover damages, or secure other relief, is through class actions. Yet, decisions of some courts of appeals have interpreted Rule 23 (b) in a manner that would make class certification rare, if not impossible, in cases seeking these congressionally mandated damage remedies.[4] Such misguided interpretations

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[3] Thus, in the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 et seq., as amended, Congress eliminated a $1,000.00 limit on punitive damage awards and provided for civil penalties in federal enforcement actions in housing discrimination cases. And in the Civil Rights Act of 1991, 42 U.S.C. §2000e, et seq., as amended; and, 42 U.S.C. §1981a, Congress provided for compensatory and punitive damages for discrimination in employment. As well, the Supreme Court determined that damages were available under other federal civil rights statutes. *See e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (damages available for intentional violations of Title IX of the Education Amendments Act and Title VI of the Civil Rights Act of 1964).

[4]Specifically, the decisions of some courts of appeals have interpreted the Advisory Committee Notes to the 1966 Amendment to the effect that Rule 23 (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," and interpreted the requirement of Rule 23 (b)(3) that common questions "predominate" over questions affecting individuals, in a manner that would preclude certification of almost any civil rights action that sought a damages remedy. *See Smith v. Texaco,* 263 F.3d 394 (5th Cir. 2001), *withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein*

of Rule 23 turn expanded civil rights remedies against the victims of discrimination: civil rights plaintiffs would be forced to elect between class-wide remedies for systemic discrimination, or the rights of individual class members to recover damages. These misapplications of Rule 23 (b) confound the intent of Congress, frustrate federal civil rights enforcement, and deny the benefit of the law to victims of discrimination. In considering legislation on the issue of class actions, Congress should not add to the difficulty in securing the opportunity to prove and obtain relief for patterns and practices of unlawful discrimination. Yet by compressing virtually all substantial class actions into federal courts and imposing additional burdens on their prosecution, this legislation would increase pressure on courts to dispose of class actions by denying certification altogether.

This legislation, is one of a number of measures that is making class action litigation more difficult and costly and less accessible and effective. For example, the proposed amendments to Rule 23 recently approved by the Committee on Practice and Procedure impose a number of new procedural requirements and judicial determinations, as well as a number of new notice requirements to federal class action practice, that will further complicate and delay disposition of class actions and make them more expensive and less available to the victims of discrimination and others with federal interests that need to be protected. Further, amendments to the Civil Rules in 1993 and 2000 have made federal courts less well equipped to handle large and complex class actions by imposing limits on the opportunity for discovery. In combination, all of these changes are rendering federal courts inhospitable and ill-equipped forums in which to litigate complex class actions. Forcing virtually all substantial class action suits into these forums, as the Class Action Fairness Act would have us do, will further compound the difficulty of filing and litigating a class action, including important civil rights cases.

V. CONCLUSION

On behalf of the Lawyers' Committee, our Board of Directors and Trustees and our independent local affiliates, I would like to thank you again for the opportunity to share the concerns we and others in the civil rights community have about this pending legislation. We believe the

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v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228 (11th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *modified, suggestion for reh'g denied* (Oct. 2, 1998); and, *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). In addition, some courts of appeals have interpreted the requirement of Rule 23 (b)(3) that class treatment be "superior," in a manner that would prevent certification of civil rights class actions (as well as preclude individual actions) seeking to establish a pattern or practice of discrimination. *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 758-762 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *see also, Allison v. Citgo Petroleum Corp.*, 151 F.3d at 420-426. *But see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(2), 23 (b)(2) modified to provide opt-out notice, or bifurcated certification under 23 (b)(2) and (b)(3)); *Lemon v. Int'l. Union of Operating Engineers, Local 190, AFL-CIO*, 216 F.3d 577 (7th Cir. 2000)(certification of civil rights class action seeking damages available, alternatively, through 23 (b)(3), divided certification under 23 (b)(2) and (b)(3), or 23 (b)(2) modified to provide opt-out notice) ; *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999)(same).

effect of this legislation on the availability of federal civil rights class actions will be devastating and urge you to reject it. 10The Lawyers' Committee joins with a host of other organizations in opposing this legislation. We believe the impact that it will have on the ability of our clients to seek legal redress through class actions will be profound, and will result in new and substantial limitations on access to the courts for victims of discrimination.

SENATE JUCICIARY COMMITTEE
Testimony of Irving Cohen, Interclaim Holdings, Ltd.
July 31, 2002

Thank you for allowing me to submit this written testimony.

I am the Chief Operating Officer of Interclaim Holdings Limited, a privately owned asset recovery firm headquartered in Dublin, Ireland. Interclaim specializes in recovering large sums of money for companies and individuals that have been defrauded, where the stolen money has been hidden offshore through complicated laundering schemes.

I am here today to address the proposed settlement in the case of *Schuppert, Dugger, Frederick v. Down, Barnes, Street, Whitehead-Down* in state court in Madison County, Illinois.

Interclaim became involved in this case in June 1998 when the FBI and the U.S. Attorney's office in Seattle contacted the company with a request that we provide assistance in locating the funds of James Blair Down. Down, a Canadian, was convicted in December 1998 in the U.S. District Court in Seattle for a federal criminal conspiracy in operating telemarketing and mail scams involving the illegal sale of interests in foreign lottery pools. In short, Down had used telemarketing and direct mail scams to fleece hundreds of thousands of largely elderly Americans out of more than $150 million.

Over the course of Interclaim's investigation, we were able to locate more than $100 million of Down's laundered assets that he had hidden in eight countries. In December 1998, Interclaim began involuntary bankruptcy proceedings against Down in the British Columbia Supreme Court, freezing those assets. Courts in Switzerland, the British Virgin Islands, the Channel Islands, Barbados and elsewhere helped affect the worldwide freeze on the laundered proceeds of Down's crimes.

Then, following an intensive set of complex legal proceedings in Canada – some of which are still ongoing – we hired an American class action law firm to institute proceedings in the United States. Interclaim retained Ness, Motley, Loadholdt, Richardson & Poole (Ness Motley) in February 2000 to represent both our firm and Down's victims. Ness Motley selected Madison County, Illinois as the venue for the case to be heard.

In a rather amazing turn of events, Ness Motley accepted a demand by Down and his counsel that Interclaim and the victims who had been working with Interclaim be excluded from the negotiations and from benefiting from any ensuing settlement. Even though Interclaim was Ness Motley's client, they agreed to Down's conditions.

Judge Nicholas G. Byron of the Third Judicial Circuit Court in Madison County, Illinois is scheduled to rule August 14, 2002 on the fairness of the proposed settlement. This settlement is blatantly unfair to Down's victims.

The settlement proposes that Down's entire liability be a maximum of only $10 million – a small fraction of the more than $150 million he stole from his victims. The proposed division of these funds is $6 million for the victims, $2 million for Ness Motley and another $2 million in notice and administrative costs. Obviously, $6 million dollars will not ensure that every victim gets just reimbursement. This, however, is only the first injustice. There are numerous other barriers the victims must overcome before they even attempt to reclaim their losses.

Not only is this amount insufficient when divided across the estimated 1 million victims, but little of it will ever be distributed to them due to the incredible barriers that have been placed in their path by Down and Ness Motley.

First, the victims need to be aware of the settlement fund. Ness Motley's idea was to randomly place advertisements on television or in print media. As a more fair and realistic alternative, Interclaim provided the court with a list of 418,846 victims. This list, which was obtained from one of Down's mail houses, was first tested and then used to mail a postcard notice to every single one of victims.

Second, the notice that was sent was both incomplete and misleading. The notice listed only nine of the 57 companies used in the scams and omitted Down's name completely.

Third, the $6 million for restitution is divided into two pools of money. To prove their claims for the first pool of $5.5 million, the claimants will be required to produce complete details of their transactions with Down's scams – listing each purchase, the date and amount – and include copies of credit card bills, checks or money orders. Most of the transactions are five to ten years old. Tracking down this type of documentation would be difficult for most individuals, but particularly difficult for the largely elderly victims.

Fourth, the availability of the second pool of $500,000 is clearly misrepresented in the Notice of Settlement. The Settlement states in bold type: "In order to participate in the settlement, you must have proof of payment." A prospective class member who saw this notice, but did not have proof of loss, would most likely never request a claim submission package.

Fifth, the claimants must notarize their claim forms. This can only be described as a burden to class members without any discernable benefit.

Sixth, there is no guarantee that any money will ever be paid to the victims. The proposed settlement includes a secret "Letter Agreement" that was filed initially "under seal" that allows Down to defer paying valid claims for three years or more without having to provide any security.

In other words, under the proposed settlement Down can rest comfortably in his $17 million Barbados beach home with his coterie of show dogs with the sure knowledge that

few of his victims will ever hear about the settlement or, if they do, qualify for restitution or be paid for their losses.

The irony of all this is that there are documented lists of almost one million of Down's victims. These lists have the victims' names, addresses, telephone numbers and the dates and amounts each lost on Down's various scams. Interclaim provided one list of 418,846 to the Madison County court. It is believed that other lists with hundreds of thousands of additional names is in Down's possession or control, which he refused to turn over to the court. The list that was provided to the Madison County court was tested for accuracy by the plaintiffs' counsel and found to be more than 80% accurate. The list in question was obtained directly from a mailing house employed by Down.

If the victims' best interests truly were the number one priority, why waste time and money placing advertisements that victims may or may not see? Why require the victims to locate five to ten year old payment records when Down's own "customer" lists show exactly how much he took from each person? Why not start by contacting the already identified victims and giving them back their money, plus interest?

The alternative is for Down's elderly victims to be victimized for the second time, victims of "class action" justice in Madison County. The lawyers will get $2 million and the victims' will get more illusionary prizes.

Honorable Jeff Sessions
United States Senator
493 Senate Russell Building
Washington, D.C. 20510

April 3, 2002

Dear Senator Sessions:

I write to you as ranking member of Administrative Oversight and the Courts Subcommittee of the Senate Judiciary Committee to express my concerns about the direction of class actions. I know that you are a co-sponsor of the Class Action Fairness Act of 2001 and I hope that you will work with the other Senators in the Senate to make sure this legislation passes. This legislation will certainly change the direction of what is currently a flawed system.

Viewed in the criminal context, I believe that, under the current system, class action members are subjected to double jeopardy. First, they are harmed by the tortfeasor. Second, they are harmed by the results of the class action.

The current question in class actions appears to be "how much money can I – the attorney – make," not "who has been injured." Were the focus properly placed, the plaintiff, suffering actual injury, would not be left without compensation while the attorney becomes an instantaneous millionaire.

As a member of the breast implant class action, I have first hand experience of this double jeopardy scenario. The breast implants that I had failed in 1988. The right implant ruptured, releasing silicone throughout my body. I cannot explain, in words, the adverse impact this has had on my life. One results is that I have allergic reactions to a great many things.

Over a period of time, to remove silicone and correct disfiguration and deformity, I have had at least ten surgeries, and I have had to pay for these medical expenses out of pocket.

In 1993, I became aware of a class action that had been filed, with Stan Chesley serving at the lead attorney on behalf of the class. I was hopeful that the result of this class action would be justice. In fact, the result was worse than my worse nightmare.

Instead of advising me to send my paperwork to the claims administrator, Mr. Chesley advised me that I should send it to his office and that he would forward it to the administrator. Mr. Chesley's doctor examined my records and determined, without seeing me, that the severity of my injuries was in the **Class C** category. However, my doctor, after examining me and reviewing my medical records, found the severity level to be **Class A** and said that I was totally disabled. Because Mr. Chesley's doctor determined that I did not meet the criteria they did not send my paper work in on time. And therefore , I received one thousand dollars instead of $100,000 that a **Class A** plaintiff with a rupture whose paperwork was properly filed would have been entitled to.

As you consider class action legislation and reform, please remember who has actually been injured in these situations and do not subject them to further injury by allowing collusion in settlement agreements and attorneys to become instantaneous millionaires.

Thank you for listening to my story.

Sincerely and Respectfully,

Karen Ann Kovacs

Poem Attached

Master of Disaster

Somehow God has given me some rather stunning,
shocking and uncanny evidence!

That proves I've got the goods on the big bad fat cat
For the whole wide world to see,
I've got the goods on a big fat cat and his name is Stan Chesley

The chips are down. The jig is up and everyone can see
The dastardly deeds I have accused him of, I can prove quite easily.

The master of disaster has destroyed my case you see.
The master of disaster all but ruined what's left of me!

Mostly everyone looks the other way,
Shake in their shoes and twiddles their thumbs.

While Stan Chesley and his cronies have been given right to do wrong.

Right now, they are planning the biggest scam, sham, and
Flimflam , known to the history of man.

By stealing billions from the sick and the poor in the name of the tobacco
class action.

Won't you please help put an end to these men
And their even plan, while you still can.

Karen Ann Kovacs
P.O. Box 1063
Holyoke, MA 01041

Testimony of Lawrence H. Mirel
Commissioner
District of Columbia Department of Insurance and Securities Regulation
July 31, 2002

Thank you, Mr. Chairman and members of the Committee. My name is Lawrence Mirel. I am the Commissioner of Insurance and Securities for the District of Columbia. The position I hold was originally created by Congress as the Office of the Superintendent of Insurance for the District of Columbia in 1901[1] and became part of the District's "Home Rule" Government upon the passage of the Home Rule Act of 1973.[2] As you know, the business of insurance is regulated primarily by the states.[3] Although the District of Columbia is not a state, I have the authority of a state insurance commissioner, and I am a full and active member of the National Association of Insurance Commissioners. My job is to enforce the insurance laws and the securities laws of the District of Columbia as enacted over the years by the Congress of the United States, as the District's primary legislature,[4] and by the Council of the District of Columbia since that body was created in 1974.

I am concerned with the impact of class action lawsuits against insurance companies that limit and interfere with my ability—and the ability of my state insurance commissioner colleagues—to carry out our statutory duties. These

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[1] 31 Stat. 1289, CH 854 § 645
[2] The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 777, D.C. Official Code, § 1-201.01 *et seq.*
[3] McCarran-Ferguson Act, 15 U.S.C.A. § 1011 *et seq.*
[4] U.S. Constitution, Art. I, Section 8, clause 17.

duties include protecting the public and assuring that insurance is available to and affordable by consumers.

Insurance is a highly regulated business, and it needs to be. There is no other business in which a customer pays now for protection against some future event without knowing when, or even if, it will occur. As insurance commissioners, we must make sure that when a covered claim is made the company that took the consumer's premium money is able and willing to pay that claim. We are also responsible for making sure that insurance is available and affordable for our citizens, and that insurance companies are able to offer their customers good products at fair prices in accordance with clear and uniformly applied laws and regulations.

As state insurance commissioners, our primary function is to protect the public. I and my colleagues see ourselves as consumer advocates, and the laws we administer give us that responsibility and authority. Our expert staffs are knowledgeable about the stringent laws that govern the operation of the business of insurance, and about the complex financial rules that insurance companies must follow. We receive and act upon consumer complaints against insurance companies. We make sure that insurance contracts are fair, understandable, and in accordance with the law. We go after companies that do not treat their customers properly, or that are engaged in fraud. We have substantial enforcement tools at our disposal, including the authority to fine or even to close down insurance companies that misbehave, and to refer bad actors for criminal prosecution.

Large scale nationwide litigation against major insurance companies frequently goes around or simply ignores the role of state regulators. Class action lawsuits against insurers can, and often do, directly impact our statutory authority to regulate the business of insurance in our jurisdictions. Moreover these suits, whether successful or not, can have a major effect on the cost and even the availability of good insurance products to the public. That is because they are frequently designed to produce a small, sometimes negligible, benefit to a large class of policyholders—and incidentally huge legal fees to the lawyers who bring them—without regard to the impact on the insurance market as a whole and the cost to the insurance-buying public.

Consider the following examples:

- In Texas, two of the state's largest automobile insurance companies decided to settle a $100 million class action lawsuit brought against them in 1996 over a long-standing, industry-wide practice of "rounding up" to the nearest dollar for auto insurance premiums. Although the insurers' premiums were calculated according to specific instructions from the Texas Department of Insurance, mounting legal expenses and negative publicity compelled the companies to settle for nearly $36 million. Policyholders received refunds of about $5.50 each, while the lawyers took home almost $11 million.
- More than 20 nationwide class action lawsuits are currently pending in New Mexico's trial courts claiming that insurance companies are misleading policyholders by not disclosing the "annual percentage rate"

> of fees charged for processing installment payments of premiums. In the District of Columbia, and in most if not all states, companies are allowed to charge small processing fees for allowing customers to make "modal payments" on their annual premiums, so long as those charges are disclosed and are reasonable. I would not permit companies selling in the District of Columbia to show these fees at an "annual percentage rate" because APRs imply that a loan was made, and there is no loan. Modal payments are simply a convenience to customers who would rather not make lump-sum annual payments. There has never been a complaint about such charges in the District of Columbia or any other jurisdiction, as far as I know. Yet not only was the issue not raised with the New Mexico Insurance Commissioner before suit was filed, but when he tried to intervene in the case his petition was denied.

Facing potentially billions of dollars in liability costs, as well as the threat of massive costs to defend themselves against these suits, insurance companies are under tremendous pressure to settle. One modal premium case, against Primerica, has already been settled, with $7.5 million paid to the plaintiffs attorneys and *nothing* to class members. Another proposed settlement of $10 million in a modal payment suit against Massachusetts Mutual, all of which was to go to the plaintiffs attorneys, was withdrawn when Trial Lawyers for Public

Justice—a plaintiffs' lawyers trade association—denounced it as "outrageous" and "an abuse of both the class-action device and class members."

- A billion-dollar judgment in Madison County, Illinois, against State Farm, the nation's largest auto insurer, that would provide miniscule payments to the six million plaintiffs, but huge fees for the lawyers who brought the suit, has caused State Farm to discontinue nationwide its practice of replacing damaged auto parts with parts made by companies other than the original manufacturer of the automobile. Now on appeal before the state's Supreme Court, the trial court decision has been strongly denounced by consumer advocates. Clarence Ditlow, director of the Center for Auto Safety, a non-profit group founded by Ralph Nader and Consumers Union, has expressed fear that the decision will end the use of after-market parts, which are allowed in most states and the District of Columbia. Mr. Ditlow believes such a move could cost consumers an extra $2 billion to $3 billion a year for auto repairs, which of course means higher auto insurance premiums.

On this issue I can speak as a consumer as well as an insurance commissioner. Recently, I was involved in an automobile accident where the other driver was at fault. I have State Farm insurance, and my premiums will be increased if the Madison County case is upheld and State Farm is required to pay the $1 billion judgment. The person who hit my car, however, was not insured by State Farm. His insurance company replaced my crumpled fender

with a non-original equipment part. I did not object because the non-o.e.m. part was a perfectly reasonable alternative to the much more expensive "original" equipment fender, and the car in any event was five years old and did not need a "new" fender. But I was going to have to pay for the cost of a lawsuit in Illinois while not receiving any of the supposed "benefits" provided by that suit.

There are other examples as well.

- A suit currently before the California Supreme Court claims that State Farm is keeping too much money in reserves, thereby depriving its policyholders (State Farm is a mutual company) of the benefits of that money in the form of refunds or reduced premiums. The suit ignores the fact that insurance commissioners, such as myself, *require* insurance companies to maintain adequate reserves, so that we can assure the public that their covered claims will be paid. Who should decide what level of reserves are "adequate" to protect the State Farm policyholders in the District of Columbia, the statutory Commissioner of Insurance for the District of Columbia or a jury of laymen in California?
- Or the case currently pending in Georgia against GEICO claiming that GEICO is defrauding its insureds by paying only the cost of fixing a damaged car, and not the loss of value of the car because it has been damaged in an accident—even though the insurance contract, which has been approved by insurance commissioners of the various states where GEICO operates, specifically requires the company to fix the car, not to pay for any diminished value of the vehicle.

Let me be clear about my position. I am not opposed to class action lawsuits. Class action suits, when used properly, have an important role to play in our legal system. But I am concerned that they do not substitute for, or interfere with, other lawful methods of protecting the public. When suits are filed on behalf of persons residing in more than one state, those suits should be filed in Federal, not state, court so that we do not have a court in one state, applying the law of that state, setting policy for all the other states and the District of Columbia. When suits are filed against a regulated industry, the statutory authority of the regulator—whether state or Federal—must be taken into account, not circumvented. When the costs of large class action lawsuits are substantial, whether the cases are litigated or settled, it must be recognized that these costs will be paid by insurance consumers. When valid insurance company practices, reviewed and approved by state insurance regulators, are challenged in class action litigation, we must recognize that the result could be the discontinuation of products that are desired by the public and are beneficial to the public.

I commend the Senate Judiciary Committee for holding hearings on this important topic, and for considering the "Class Action Fairness Act of 2001." S. 1712 is a good start toward finding the proper balance between the use of class actions to vindicate the common claims of large numbers of people and the potential adverse impact of such suits on other citizens and consumers.

In addition, S. 1712 has a set of provisions that directly protect consumers and that would be of very substantial value in the most abusive insurance litigation.

Among other things, the bill:

- Requires closer judicial scrutiny of class action settlements that provide class members with only coupons or other forms of non-cash relief.
- Requires that notices of settlement be written in plain English so that they can be understood by the ordinary consumer. We've all received these sorts of notices in the mail, and we know they give every appearance of having been written to be incomprehensible.
- Bars class action settlements that actually cost the class members money.
- Bars class action settlements that provide more benefits to certain class members on the basis of proximity to the courthouse -- the worst sort of "home cooking" that is fostered by the existing system.
- Requires that notice of proposed class action settlements be provided to state and federal regulators so that we have an opportunity to do something about truly collusive and abusive deals.

I am particularly pleased to see that the bill recognizes the roles played by Federal and state regulatory officials in protecting the public by requiring notice to such regulators. (Section 1717). I would like to suggest one amendment to that section. It would be helpful to have the District of Columbia included in the

definition of "Appropriate State Official." That can easily be done by inserting the words "or the District of Columbia" after the word "State" on page 10, line 17.

I want to conclude by expressing my hope that class action reform not be looked at as a partisan issue. I was appointed to my present position by the Democratic Mayor of the District of Columbia, Anthony A. Williams. In an earlier part of my career I worked here in the Senate for Democratic Senator George McGovern. Before that I had been a special assistant to another Democrat, Abraham Ribicoff, when he was Secretary of Health, Education and Welfare and had worked on his campaign for the Senate. I do not think that concerns about possible abuses in the use of class action lawsuits should be limited to one party or one level of government. We are all concerned about one thing—protecting the public in the most effective and efficient way we can.

Thank you for your time, and I am happy to answer any questions you may have about my testimony.

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Omaha World-Herald ONLINE EDITION

Published Monday
July 29, 2002

Fix class-action abuse

The Senate Judiciary Committee is about to consider reforming the way class-action lawsuits are filed. The legislation offers hope that the senators will take an irrational and capricious system and inject a much-needed dose of sense.

Class-action suits can be an effective tool to hold businesses accountable and to compensate large groups of people injured by the same thing. But abuse of the system, which has grown, should spawn reform.

In March, the House passed similar legislation. Both would move would-be class-action suits from state to federal courts if they involved more than a few plaintiffs or small amounts of money or if the parties live in different states.

Class-action suits involve a group of people banding together to sue a business. But often the group is from many different states and the business may operate widely - around the world, even. A local judge should not have such power over issues of national consequence.

A recent suit filed in rural Madison County, Ill., involved Pentium processors owned by thousands of people worldwide. It makes far more sense that such broad-based claims should be decided in a federal court.

That filing illustrates another problem the reform would address: court-shopping by lawyers. A court must decide whether a case merits class-action status. There is a notorious gaggle of judges in Illinois, Florida, Alabama, Texas and Mississippi who are lenient - some would say lax - in certifying class-action suits. And once a suit is filed, it is often in a business's self-interest - even an innocent business - to settle and avoid a costly and potentially image-busting lawsuit. Federal control of such suits would allow consistency in rules and precedents.

The Senate proposal also contains some consumer-friendly language. For instance, it would specify that settlement notices distributed to members of the class be written in plain English. And it would require the court to closely scrutinize any settlement plan that gives plaintiffs coupons redeemable for products while their lawyers walk away with millions in cash.

The situation is illustrated by the settlement of a class-action suit against Blockbuster Video over excessive late charges. The settlement, in theory, paid Blockbuster customers $460 million. Attorneys in the case collected $9.25 million.

But the customers each got between $9 and $20 in coupons for rentals and non-food items at the stores, which amounts to a marketing ploy. Ed Stead, executive vice president of the company, told The Los Angeles Times that he expected no more than $45 million in coupons to be redeemed.

The proposed legislation contains no caps on either legal fees or awards. That might be something for Congress to think about later. There should be some balance between what is paid to attorneys and what their clients get. But the measure at hand is at least a start.

The power of the nation's trial lawyers will be arrayed against this. Who stands up, who caves in and who tries to wriggle out will tell Americans a lot about their senators.

July 30, 2002

Senator Patrick J. Leahy, Chairman
Senator Orrin Hatch, Ranking Minority Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Senator Hatch,

My name is Martha Preston and I live in Baraboo, Wisconsin. I am 64 years old and work as a librarian for a school here and part-time for Lands' End.

I wanted to attend today's Senate Judiciary Committee hearing on class action litigation to talk about how I was victimized by "my lawyers" in a class action lawsuit, but I have some physical problems right now and can't make the trip to Washington. I want you to know, though, that what some lawyers are doing in class action lawsuits today is outrageous and the United States Senate should do something to it.

Several years ago I received a notice about a class action lawsuit filed against my mortgage company BancBoston Mortgage Corporation. The suit said that the Florida-based company did not promptly post interest to the real estate escrow accounts of 715,000 account holders around the country. I thought it was a good thing. It wasn't until later that I learned it was only a good thing for my lawyers.

My share of the class action settlement came to about $4 but about $95 was taken out of my escrow account to pay for the $8.5 million dollars in legal fees that went to the attorneys who were supposed to be representing me. I was astounded. How could this happen? The lawsuit I was led to believe was going to benefit me ended up costing me money.

Many of us caught up in this legal nightmare couldn't believe these lawyers could get away with this. We tried to appeal the settlement to the Alabama judge who approved it, but he turned us down. We tried to sue our lawyers for conspiring to defraud us by sending out legal notices that falsely indicated that consumers would win money when they knew the settlement would primarily benefit themselves. The case was dismissed for technical reasons.

Our "lawyers" then had the gall to turn around and sue one of us for $25 million dollars for questioning their integrity. That case was dismissed.

My loss of about $90 was not great, but my indignation was huge. How could lawyers be allowed to use our court system to rip me off like that and then dance away counting their millions?

I think the Class Action Fairness Act (S. 1712) would help to fix the class action lawsuit system. I think my case, which involved plaintiffs from all over the country, would have been handled differently if it had been in federal court and not in a state court in Alabama where the lawyers found a friendly judge. The bill would ban any settlements in which the class members like me lose money. The bill would also require that the class and settlement notices be written in "plain English."

I testified before this same committee 5 years ago asking you to stop these abusive class action lawsuits and nothing has happened. I read in the paper all the time about other class actions in which consumers get little or nothing and their lawyers get millions in fees. Why does the U.S. Congress let this continue? Class action lawsuits are supposed to help consumers like me, but instead they have turned into scams for lawyers out to make big fees.

It's time to put a stop to this kind of abuse. Please pass the Class Action Fairness Act right away.

Martha Preston
E11583A Mine Rd
Baraboo, Wisconsin 53913

Senator Patrick J. Leahy, Chairman
Senator Orrin G. Hatch, Ranking Minority Member
United State Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

fax: 202-224-9516

Dear Chairman Leahy and Senator Hatch:

South Dakota Chamber of Commerce
And Industry

Written Testimony on S 1712 – Class Action Fairness Act
Submitted to
Senate Committee on the Judiciary
July 31, 2002

The South Dakota Chamber of Commerce and Industry wishes to thank members of the Senate Committee on the Judiciary for taking time to consider these comments regarding the Class Action Fairness Act (S 1712).

The South Dakota Chamber of Commerce and Industry is a 501 (c) (3) organization that is supported by a membership of more than 750 businesses in the state. One of our key roles is to serve as the manufacturing association for South Dakota. Our members employ over 130,000 workers, which is about 37% of the state's entire workforce. The purpose of our organization is to address public policy that can affect the business community.

Product liability and class action lawsuits are among the issues of greatest concern to our members and we ask members of the committee to pass S 1712. This bill is a good-faith approach to finding a reasonable solution to the most urgent problems stemming from this type of litigation without making it too difficult for an aggrieved group to have their day in court and to seek appropriate redress.

The challenge for lawmakers is to approve changes in the current class action system that preserve the strengths of the system, which can occasionally be the only viable way to resolve disputes that are widespread, while sheltering that system from being misused and abused as a gimmick that enriches a few opportunistic individuals. S 1712 achieves that delicate balance.

There is a need for more consistent application of the concept of class action. By definition any problem that can have a national scope should be freed from the quirks or proclivities inherent in local perceptions. The possibility that a handful of select jurisdictions which have proven to be more inclined to certify class actions suits, could place any business in the country into the

SD Chamber of Commerce – Testimony on S 1712
Page 2

excruciating process of defending themselves in a class action litigation, gives our entire judicial system a sense of being driven more by personality than by "rule of law".

The most consistent complaint heard from Chamber members regarding the judicial system is the complaint of "legal extortion". This is the feeling expressed by business owners/managers after being told by their own attorneys it would be cheaper to pay off a goofy claim than it would be to defend themselves in court.

In the case of a growing number of class action cases this practice of legal extortion takes and even more insidious dimension. It is frustrating enough when a viable business has to give money to someone to "go away" but it borders on criminal when the only people taking the money are the attorneys leaving those who are allegedly harmed by their business with only discounts or a sliver of the money paid out.

When a business must pay to settle a class action claim it can pay only an amount that will allow it to remain a viable operation. When that finite amount of money goes primarily to the attorneys rather than to the people those attorneys were allegedly were trying to help, the class action system takes on flavor more rancid than the accusations that originated the claim.

One of the very best reforms of S.1712 is the requirement that solutions are in plain language and easily accessible to those entitled to the remedy. Having recently received a card informing me that I was part of a class action settlement I tried to find out what my part of the remedy was by using the listed website. I could not tell the committee to this day what was offered to those that were part of that settlement. It is reasonable to assume the lawyers that settled the case (Verizon Communications) had no difficulty either finding or understanding their gain from this lawsuit.

As an advocate for the business community for my entire career it was hard to decide whether the larger atrocity was the fact that the Chamber had been included as the member of a "class action" suit without our knowledge, an action this organization would be loath to pursue, or that some "settlement" that had cost a business millions would be like a river that disappears into a sink hole leaving those at the end high and dry.

The concept of class action lawsuits is valid and must be protected. It is a concept that will be much stronger with the reforms outlined in S.1712. The South Dakota Chamber of Commerce and Industry urges it passage.

Should you have any questions please do not hesitate to contact me (David Owen, President) at 605/335-6060.

cc: Senator Herb Kohl
Senator Charles Grassley
Senator Tim Johnson
Senator Tom Daschle

Source: News & Business > News > **News Group File, Most Recent Two Years**
Terms: **a system designed to help consumers can be subject to abuse as well** (Edit Search)

The Times Union (Albany, NY) July 28, 2002 Sunday

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July 28, 2002 Sunday THREE STAR EDITION

SECTION: PERSPECTIVE, Pg. B4

LENGTH: 460 words

HEADLINE: Fix class-action law;
A system designed to help consumers can be subject to abuse as well

BODY:
In theory, consumers who feel they have been misled about a company's product can seek redress through a class-action lawsuit. But in practice, they are likely to receive little compensation, often no more than a few dollars or discount coupons to purchase more of the company's product.

When it comes to the lawyers who file these suits, however, it's a different story. They stand to make millions of dollars in fees. The system is supposed to protect consumers by holding corporations accountable, and some class-action suits unquestionably serve this purpose. But there is also the potential for abuse, as the House noted last March when it passed, 233-190, a reform measure known as the Class Action Fairness Act. But its fate in the Senate, where the Judiciary Committee has scheduled hearings for this week, is not certain.

It should be. Passage is overdue, as just a few examples of class-action settlements make clear:

A suit against a Blockbuster video store in Texas yielded two free movie rentals and dollar-off coupons for the plaintiffs. The lawyers collected $9.25 million in fees.

In a suit against a credit card issuer, plaintiffs received $3.57 each, while the lawyers received $2.5 million in fees and expenses.

These aren't isolated cases. They are representative of hundreds of cases in a system that, in the words of U.S. Supreme Court Justice Sandra Day O'Connor, has "made more overnight millionaires than almost any other business."

The present system allows lawyers to file class-action suits anywhere in the country, and the savvy ones usually file in counties where the judge is less likely to be critical of the merits of the case. As a result, a single county jurist can settle a case of national significance.

The reform measure would change all that by giving federal courts more jurisdiction over these cases. Such a move would bring uniformity to claims, as well as allow for consolidation of cases, thereby reducing caseload backlog.

Not surprisingly, trial lawyers oppose the measure, and New Yorkers are fully aware of the clout wielded by the trial lawyers lobby. They have long prevailed on Assembly Democrats to block a law that would permit cameras inside New York courtrooms.

There's no question that a strong class-action law helps to keep companies accountable. But there's no question, either, that the present system can be abused. As a Public Citizen lawyer

observed about one class-action case involving computer monitors, the settlement could be "viewed as a cheap resolution of class members' claims or else a convenient vehicle for churning essentially worthless claims into a gargantuan fee of $5.8 million for the plaintiffs' attorneys."

Enough. It's time for reform.

LOAD-DATE: July 29, 2002

Source: News & Business > News > **News Group File, Most Recent Two Years** ⓘ
Terms: **a system designed to help consumers can be subject to abuse as well** (Edit Search)
View: Full
Date/Time: Wednesday, August 7, 2002 - 4:33 PM EDT

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STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING CLASS ACTION LITIGATION, WEDNESDAY, JULY 31, 2002, SD-226, 10:00 AM.

Mr. Chairman:

Thank you for holding this hearing on class action litigation. Today, I am pleased that we will discuss S. 1712, the Class Action Fairness Act. This bill represents a reasonable and measured response to current problems that plague class action lawsuits, and I am proud to be a cosponsor of this important piece of legislation.

It is critical for Congress to ensure that class action litigation provides an efficient avenue for injured plaintiffs. Class action lawsuits play a very important role in our judicial system. We generally think of lawsuits as involving a few named persons. However, in class actions, hundreds or thousands of people are often involved. Class actions allow aggrieved people to combine together to bring a lawsuit that would not be worth bringing on their own. By combining together, the case can generate enough money to compensate attorneys, and the results can be quite beneficial for plaintiffs.

However, class action litigation has been subject to rampant abuse. In recent years, plaintiff's attorneys have

flooded state courts with class action suits. In many state courts, the certification of a class is not subject to the appropriate level of scrutiny, and defendants are dragged into numerous lawsuits of questionable merit. Once the class is certified, there is enormous pressure on defendants to settle. It is easy to see how, without proper judicial oversight, class action litigation can become a legal form of extortion. It forces corporations to spend a significant amount of resources paying settlements and litigation costs, which ultimately drives up the prices for consumers.

Another problem posed by the proliferation of nationwide class action cases filed in state courts is that the decision of a state court may have a national effect. Therefore, a state court can effectively make law for other jurisdictions, creating troubling federalism issues.

Class action abuse also harms the interests of legitimate plaintiffs. For example, there have been cases where plaintiffs received coupons as part of the settlement, while the lawyers walked away with hefty attorney fees. In effect, lawyers have an incentive to represent an ill-defined class, settle for damages that confer no real benefits, and walk away with large fees. A study performed

by the Institute for Civil Justice and the RAND Institute found that in state court settlements, the plaintiff's lawyers routinely made more money from consumer class action cases that all class members combined. I find these abuses to be unacceptable, and we should vigorously pursue reforms that will assure a real benefit to deserving plaintiffs.

S. 1712 addresses the problems that I have highlighted. This legislation makes it easier for Federal courts to hear class action cases. Federal courts are in a much better position to handle these complex cases that involve plaintiffs from all over the country. Additionally, Federal courts carefully scrutinize class action cases, and plaintiffs will no longer be able to shop for sympathetic state forums that refuse to put the brakes on frivolous litigation.

The Class Action Fairness Act will also protect truly deserving plaintiffs so that they receive appropriate relief. The bill would require a court to approve, after a hearing, settlements that provide class members with non-cash benefits only. In addition, for those settlements in which any class member is obligated to pay sums to lawyers that would result in a net loss to the class member, the

court would be required to make a written finding that non-monetary benefits substantially outweigh the monetary loss. This bill would also prohibit class action settlements that provide greater awards to class representatives than to absent class members.

Furthermore, the bill would require that notices of proposed settlements to class members be in plain language and not legalese. This requirement would no doubt assist all potential plaintiffs, who should not have to be lawyers in order to understand notices of settlements.

Mr. Chairman, thank you for holding this hearing on a very important issue. We live in an extremely litigious society, and an explosion of class action lawsuits has flooded our courts. By enacting the Class Action Fairness Act, Congress would take the important step of reining in a system that is in need of repair. This bill would do nothing to discourage legitimate class action suits. Rather, it would make small changes to the law, so that lawyers are not rewarded at the expense of deserving plaintiffs.

Statement Submitted for the Record
on
The Class Action Crisis
and
S. 1712 – "The Class Action Fairness Act"
to the
United States Senate
Committee on the Judiciary
by the
U.S. Chamber of Commerce
and
U.S. Chamber Institute for Legal Reform

July 31, 2002

Introduction

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and professional organizations of every size, sector, and region of the country. The central mission of the Chamber is to represent the interests of its members before Congress, the Administration, the independent agencies of the federal government, and the federal courts. The mission of the Institute for Legal Reform is to reform the nation's state and Federal civil justice systems to make them more predictable, fair and efficient while maintaining access to our courts for legitimate lawsuits.

Given the diversity of our membership, the U.S. Chamber of Commerce is well qualified to discuss this important topic. We are particularly cognizant of the problems that small businesses face in abusive class actions because more than 96 percent of our members are small businesses with 100 or fewer employees and 71 percent have 10 or fewer employees. We welcome this opportunity to discuss the critical issue of the class

action crisis and the urgent need for Congress to pass S. 1712, the Class Action Fairness Act.

We would like to recognize the tremendous work on class action reform by Senators Grassley, Kohl, Hatch, Carper, Thurmond, Chafee, and Specter. We owe the Judiciary Committee a great debt of gratitude for its efforts to work with us to address the class action problem quickly, fairly and in a bipartisan manner. Finally, we would like to thank Chairman Leahy for holding this very important hearing.

The Class Action Problem

Class action litigation is a necessary part of our legal system because it can bring efficiency and fairness to situations involving many people with similar claims. Unfortunately, class action cases are becoming much more common and are being used in ways never envisioned or intended. In the recent past, there has been an explosion of class action cases in state courts. In essence, states with lax rules and procedures allow plaintiffs' attorneys to "game" the system in large interstate class actions by causing cases to remain in that state's courts rather than being heard in federal court. The result is that a complex, interstate legal dispute is heard in a state court that may not have the resources or expertise to appropriately manage such complex litigation. Even worse is the fact that some state courts are known to be hostile to out-of-state "deep pocket" defendant companies.

It is important to note that the framers of the Constitution created the concept of diversity jurisdiction to allow large cases with parties from different states to be heard in federal court. This was done to ensure that such cases were decided impartially, rather

than allowing the "home field" litigant an unfair advantage. Today's class action system, however, encourages such an unfair advantage. All too often, massive nationwide class actions involving citizens and the laws of all fifty states are heard in one state court. This has resulted in a race to the bottom because of the potential reward for plaintiffs' attorneys and the prospect of "bet-the-company" litigation for defendants.

Furthermore, it is not just the defendant companies who fare poorly under the current system – plaintiffs also often bear the brunt of many abuses in today's class action environment. Under current law, potential class members are often unaware of their legal rights. They may receive complicated class action notices written in legalese and printed in small, unreadable font. This leaves them at a distinct disadvantage with a potential to have their rights harmed. Under the current system, many successful plaintiffs win only nominal awards in suits brought on their behalf while the attorneys walk away with fees that are astronomical, especially when compared to the amount of damages that the plaintiffs receive. In some instances, plaintiffs have actually lost money in order to pay attorneys' fees in successful class action cases. The system is wrought with abuse and the plaintiffs are often victimized by the very system that is designed to help them.

Even if a claim in a class action may be without merit, because the case is brought on behalf of thousands or millions of claimants, a defendant's liability exposure is potentially enormous. The result is that the class counsel can exert tremendous leverage on the defendant and coerce a settlement. These settlements frequently provide little to the class members and much more to the attorneys. A prime example of this is the Bank of Boston class action settlement where the class attorneys received an $8.5 million

payment, but members of the class actually received a $91.13 debit to their mortgage escrow accounts (in other words, the class members actually ended up owing money).

The reason abusive class actions such as the one discussed above are allowed to proceed is because many interstate class actions cannot be heard in federal court. Before a class action can be heard in federal court, current law requires either that a federal question exists or that there is complete diversity between the parties. In the vast majority of cases, however, there is no federal question and the defendant's only hope to get into federal court is under the diversity statute. The complete diversity requirement means that all of the plaintiffs must be from different states from all of the defendants and each plaintiff's claim must be worth at least $75,000. Unfortunately, when defendants in a class action try to remove the case to federal court, their attempts often fail because of the complete diversity requirement.

Why is that so? Most removal efforts ultimately fail because of various pleading tricks that the class counsel uses to avoid federal jurisdiction. A good example of this is the way some attorneys plead restrictions on class claims to preclude removal. After it becomes too late to remove the claim, the attorney lifts the restrictions and reveals the true nature of the action.

Another example is "fraudulent joinder." In those cases, class counsel names defendants that are not really the target of the action merely to avoid removal (i.e., these defendants are citizens of the same state as some of the class members). Once it becomes too late to remove the case to federal court, those defendants are dropped from the action. A secondary problem with this technique is that these "extra" defendants still have to

spend significant resources to hire legal representation and fight in court. They have no way of knowing whether they are going to be dropped from the case and have to do what they can to defend themselves. If the extra defendant happens to be a small business, the thousands of dollars in legal fees and lost time can be catastrophic to the business.

In short, the class action system is now so out of balance that litigation that seemed unthinkable a few years ago is now actually being filed. For example, a recently filed lawsuit in New York state court seeks damages from fast food chains because the plaintiff alleges that they are responsible for the plaintiffs' obesity and poor health. The lawyer for the plaintiff in that case has indicated that he wants to turn the case into a class action. Under the current system, all it takes is one state court judge to certify the class and that court will be making decisions affecting citizens of states nationwide.

S. 1712 Is the Solution

S. 1712 is a narrowly tailored and balanced solution to the class action problem. The legislation does not change the substantive rights of any plaintiff to bring a lawsuit, nor does it prohibit appropriate state court class actions from being heard in a state forum. This legislation simply clarifies that the federal diversity statute no longer requires complete diversity for large, interstate class actions. Instead this legislation allows a class action to be heard in federal court if there is "minimal diversity" between the parties. In essence, this means that so long as at least one plaintiff has a different state citizenship than at least one of the defendants and at least $2 million is in controversy, then, in most circumstances, the class action can be heard in federal court.

Under three exceptions, the bill specifically allows local and intrastate class

actions to remain in state court. First, a federal judge can decline to hear local cases where a "substantial majority" of the class members and defendants are citizens of the same state and the case will be primarily governed by that state's law. Second, federal judges do not have to hear cases involving less than 100 class members. Third, when the case is against the state or state officials, the federal judge does not have to hear the case.

The legislation also closes several important loopholes that allowed class counsels to "game" the system. First, unnamed class members are allowed to remove the case to federal court within thirty days after they are formally notified about the class action. Second, any party may remove the case to federal court without seeking the other parties' permission. Third, the one-year limitation on removal will no longer apply to class actions. An exception is that a defendant must remove the case to federal court within thirty days after first becoming aware of federal jurisdiction.

If a case that is removed to federal court under minimal diversity is found not to meet federal class action requirements then the court has discretion to continue exercising jurisdiction over the case or to dismiss it without prejudice. As under current federal law, applicable statutes of limitations on the class members' claims do not run during the time the action was pending in federal court. If the federal judge dismisses or remands the claim, the plaintiffs will be permitted to refile or amend their claims without prejudice but the case could be removed to federal court again, if it is still subject to federal jurisdiction.

To combat the abuses that many plaintiffs face under the current system, S. 1712 strengthens consumer and plaintiff rights by including the Consumer Class Action Bill of

Rights. Under the new legislation, consumers will be protected by a provision requiring that all settlement information be written in plain English. In addition, the legislation mandates that all legal notices regarding settlement will inform class members with specific information about the benefits of any proposed settlement. These notices must also explain how attorneys' fees will be calculated and funded.

S. 1712 will also protect consumers against unfair settlements through a provision requiring greater judicial scrutiny of coupon and other non-cash settlements. The new legislation also prevents discrimination against plaintiffs by prohibiting payment of undeserved and disproportionate bounties or awards to certain class members. Finally, S. 1712 protects plaintiffs against suffering a net loss in "successful" class action cases.

Conclusion

The Class Action Fairness Act will guarantee that many of the more abusive class actions that are now heard in state courts will be eligible for federal jurisdiction. The bill does not modify any plaintiff's substantive rights and is only procedural in nature. The legislation simply recognizes that certain large, interstate class actions more appropriately belong in federal court rather than state court. The legislation complies with federalism principles in that it seeks to prevent the exact problems recognized by the founders when they decided to provide diversity jurisdiction to the federal courts. Further, the legislation provides the explicit protections to consumers and plaintiffs in a manner that limits the worst practices of the current class action system. S. 1712 has broad bipartisan support as well as strong support from the entire business community. Its swift and favorable enactment into law is vitally important to America's businesses, shareholders and consumers.

STATEMENT OF SHANEEN WAHL
ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA
BEFORE THE COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE

July 31, 2002

Good morning Mr. Chairman and members of this committee. I feel very special that you invited me to speak to you today.

My name is Shaneen Wahl I am about to turn 53 years old and soon thereafter will achieve my 6th year as a breast cancer survivor.

In the early 90's my husband's job as VP of sales and marketing for a large homebuilder ended. He was unable to find another acceptable job during the real estate crunch. Nobody wanted a guy in his mid 50's. We had been faithfully saving for our retirement since we were married over 27 years ago. We examined our finances and it appeared that we really would be able to retire early. We confirmed our determination with a financial planner. What, at first, had appeared to be a catastrophe turned out to be the beginning of our American dream.

We knew that as a part of retiring we would need health insurance so we purchased a policy in 1993 from American Medical Security. We bought an RV and began traveling. The dream had become a reality. The premium for our zero deductible policy in 1993 was $194 a month. In September 1996 I was diagnosed as suffering from breast cancer. That was the beginning of our American nightmare. By the time of our 1998 renewal, the monthly premium had risen 300% to $588.

Late in 1998 we received a letter from American Medical Security telling us that our policy would be canceled, but if we would re-apply we would be guaranteed a new policy. So we

did. At that next renewal we received notice that the monthly premium, for our new policy with a $500 each deductible, would be $1,180.

I began making phone calls and writing letters. I could not believe what had just happened. I was told by Florida's Department of Insurance and other departments of insurance that they had no laws that would prohibit American Medical Security, or for that matter many other health insurers, from charging such predatory premiums. American Medical Security had chosen to circumvent Florida State regulatory and Federal laws by using a loophole in the Florida Insurance law to permit "Out of State" group health insurance companies to exempt themselves from regulation.

We bit the bullet and paid the $1,180 each month since I could not go to another health insurance company because of my breast cancer history. Then in August of 2000 we received the next premium increase of $1,881. That's over $22,000 a year! I was livid. My husband and I drove to American Medical Security's home office in Green Bay, Wisconsin to challenge the increase since there was no one in government who could help me. I knew then that I couldn't just sit there and let this happen to us and other families. I had to do something. I became my own advocate and began my effort to get the laws changed. And that same determination is what brings me here today.

My hero, Florida's Commissioner of Insurance Tom Gallagher, has been working since 1993 to pass laws that would put a stop to the egregious tactics my insurance company is using. His hands have been tied due to aggressive lobbying by the health insurance companies and their deep pockets that allow them to hire the high priced corporate attorneys to fight any change to state laws.

Tom Gallagher is a hero, but the Department of Insurance initially lost its regulatory action before an Administrative Law Judge. Last week Tom Gallagher suspended American Medical Security's license to do business in the State of Florida for one year. Commissioner Gallagher's action is a very positive move toward bringing insurers under the law. However, it really amounts only to a very, very large fine. It does nothing to help policyholders like me recover the millions of dollars lost due to American Medical Security's outrageous conduct.

My attorney, Jeff Liggio and his team won the Florida class action case against American Medical Security, and will recover the money we and the other members of the class lost as a result of the company's greed and misconduct. State class actions allow consumers to take on the big and powerful corporations. Class actions can and do accomplish what our statutorily and budget limited public servants, even the great ones like Tom Gallagher cannot.

As it is, people who have been wronged by these insurance companies are morbidly fearful of coming forward to complain. They think that they will be further penalized in their premiums if they do. Some even fear bodily harm. They also don't think that they have the means, by themselves, to take on these big insurance companies and their high priced corporate attorneys to fight for their rights and reimbursement of what they have lost.

If you take away the option of being able to use the vehicle of a state class action, or make it so difficult that it will no longer be a viable process, the people who are victims of corporate wrongdoing will be powerless and hushed even further…and that is what these insurance companies want. They want the people they have wronged to just disappear.

Thank you.

I would be happy to answer any questions.

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